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CURRENT EVENTS.

INTER-STATE AND INTERNATIONAL JURISDICTION.—This phase of the general subject of conflict of laws seems to be coming to the front lately. The Cutting case can hardly be reckoned in a proper sense, one of that character, as Mexico has not yet developed a spirit of comity to any appreciable extent, and the question is diplomatic, with strong military tendencies. But the matters of inter-State garnishment, and inter-State attachment, we have always with us. And now, it seems, the English Court of Queen's Bench will to-day (August 11), tackle the question, whether the courts of that country will take jurisdiction of an action for libel between two foreigners, the (alleged) defamatory matter having been published in a foreign country. Mr. Field brought suit in London against Mr. Bennett for libel published in the New York Herald. The jury gave Mr. Field a verdict for $25,000, and the question was reserved whether, both parties being foreigners, and the publication made in a foreign country, neither having a domicile in Great Britain, the English courts can properly take jurisdiction of the controversy. We shall await the decision with interest, but we must say that at first blush, we do not see much room for discussion. The action is a personal action, the court, of course, had jurisdiction of the person of the defendant, by service of process or otherwise, or else he would not have appeared to the action, and the matter complained of, libel, is actionable, as well in England as in the United States.

SLIPSHOD LEGISLATION.—While the Congress of the United States has been wrestling with the oleomargerine problem, it seems that the English Courts have been occupied with the consideration of similar questions affecting the public health, comfort, and convenience. There were two cases; in one, the plaintiff complained of being poisoned by lead pipes in which the water used by him was conveyed from the main into his house; the blame was laid upon the water company, which the victim denounced as having "no soul to be saved." In the other case a grumbling consumer presumed to cavil with the unreduced price of gas, supplied by an incorporated company, which "had no body to be killed."

The first of these cases was in the House of Lords, the jury had given the plaintiff a verdict for £2000; the other was in the English Court of Appeals. In both cases the judges were divided in opinion. the defendants were let off "with a caution," and the blame laid on the legislature.

And just there, it may be said, in most cases of hardship and injustice, occurring in courts of justice, in which private corporations are concerned, is where the blame should properly rest. In our country it is too much the practice to charter corporations either in a wholesale way, or upon the *ex parte* representations of the promoters of the enterprise. They are naturally anxious to secure the most extensive privileges attainable and reduce the restrictive clauses to the *minimum*. They and their lobbyists have nothing else to do but to put through their bill with the fullest powers and the scantiest safeguards. They are acute, earnest, personally interested; the other side, the public, is represented by the legislator, who has a thousand things to look after, besides the ever-present problem of re-election, and he, without personal interest, and habitually anxious to conciliate, allows points to escape which, afterwards, work serious wrong to the community, and bring reproach upon the administration of justice. There is much slipshod legislation resulting in injustice and hardships, the blame of which is laid upon the courts. Instances may be found in every State in the Union, but perhaps the English case under consideration is the most perfect specimen. By the act of Parliament the Water Company was vested with the absolute power to prescribe the size, nature, strength, and materials, of the consumers' pipes, they prescribed lead as the material, the water, pure in the iron mains, became impure in the leaden service pipes, the plaintiff and his family were poisoned by its use, but the

courts could give him no redress. The defendant could say, "*Ita lex scripta est*," and it is the duty of courts to interpret the law as it is written, and cause it to be enforced according to its terms. Unless a plaintiff can bring his case within its limits, he must needs fail. "It may be said," observed Lord Bramwell, "that we are deciding the case on technical grounds. Mr. Justice Willes said that law without technicality was impossible. I content myself with saying that, so long as our law says that a plaintiff, to succeed, must do so on the *allegata et probata*, the decision must be governed by them and them alone."

NOTES OF RECENT DECISIONS.

WATERS AND WATERCOURSES — DEED OF LAND ON BANK OF RIVER—LIMIT OF OWNERSHIP — FRANCHISE — REVERSION. — In a very recent case,[1] the Supreme Court of Ohio had under consideration an interesting question, involving the ownership of land covered by water, and the reversion of privileges granted to a corporation, after the termination of the company's corporate existence. It seems that a land company, owning the land on both sides of a river, granted a canal company the privilege of constructing their canal between two walls in the river bed, with flowing water on each side of the canal. The land, on the canal side of the river, subsequently passed, by mesne conveyances, to Day, Williams & Co., and the franchise and rights of the Canal Company, which had ceased to exist as a corporation, had passd to the defendant, a railroad company. The canal itself had been disused and abandoned. The defendant proposed to use the tow-path of the defunct canal as the road-bed of its railroad, and the plaintiffs claimed that upon the dissolution of the canal company, and the disuse of the canal as a navigable waterway, all the rights, in the premises, of that company, reverted to their grantor and conseqently to them, and that the defendant took nothing by its conveyance from the representatives of the defunct canal company, because that company had no interest in the property after the abandonment of the canal as a means for transportation. And so the court held: that upon the *ouster* of the canal company from its corporate franchise, its rights to use the land and water constituting the canal, or the premises in question, could not be conveyed by its trustees, but reverted to the grantor and those holding under him; that conveyances by him to the other persons and from them to the plaintiffs, making no reservation, but constituting the river the boundary of the land conveyed, gave the plaintiff a full title to the middle of the river, and passed to him all the rights which had, previously or subsequently, reverted from the defunct canal company.

It is well settled law, in this country and in England, that when a water-course (above tide-water) is made the boundary of land conveyed, the land covered by the water-course is included, *usque ad filum aquæ*.[2] Whether this rule applies to navigable streams, above tide-water, is a question which depends for its solution upon the laws of the several States. In Ohio the owners of lands on the banks of navigable rivers owns the land to the middle of the stream, and if he owns on both sides of the river, he owns the whole bed of the stream, subject in both cases to the easement of the navigation.[3] And the same rule, it is believed, is in force in all the States. In Missouri it is held that a riparian proprietor in St. Louis, whose lot is bounded on one side by the Mississippi River is entitled to alluvial aceretions, formed on the shore, as far out as the middle of the stream.[4]

And it is a well settled rule of construction that if a riparian proprietor does not intend to convey the land covered by water to the middle, or thread of the stream, he must use proper words of reservation, or exclusion, in

[1] Day v. Pittsburg, etc. Co., 7 N. East. Rep. 528.

[2] Cold Spring Iron Works v. Tolland, 9 Cush. 402; Palmer v. Mulligan, 3 Caines, 319; Canal Commrs. v. People, 5 Wend. 423; Tyler v. Wilkinson, 4 Mason, 397; Claremont v. Carleton, 2 N. H. 369; Ingraham v. Wilkinson, 4 Pick. 468; People v. Seymour, 6 Cowen, 579; Hocker v. Cummings, 20 Johns. 91; Commrs. v. Kempshall, 26 Wend. 404.

[3] June v. Purcell, 36 Ohio St. 396 See also, Gavitt v. Chambers, 3 Ohio, 496; Benner v. Platter, 6 Ohio, 505; Lamb v. Ricketts, 11 Ohio, 311; Walker v. Board, etc., 16 Ohio, 540.

[4] St. Louis Public Schools v. Risley, 40 Mo. 356; See so, Jones v. Soulard, 24 How. U. S. 21.

his deed.[5] A deed is always taken most strongly against the grantor; and if, by its terms, a water-course is declared to be a boundary of the land conveyed, no words of restriction or reservation being used, the law will give full operation to the terms employed by the grantor, and the courts will hold that, in that connection, the word "river," means the middle of the river.

CARRIERS OF PASSENGERS—LOSS OF BAGGAGE — LIABILITY OF RAILROAD COMPANY — BAGGAGE IN SLEEPING CAR — TICKETS AND BAGGAGE CHECKS.—The Supreme Court of Tennessee recently decided a case involving the liability of railroad companies for the baggage of passengers, taken by them into the "sleeper," attached to the train.[6] We had occasion to investigate this subject, some time ago,[7] and recur to it now, as the Tennessee court goes somewhat farther in fixing the liability for loss upon the railroad company, than the cases which then fell under our observation. The Tennessee ruling is, in effect, that the railroad company, by the contract for the passage of the traveler, implies an insurance of his baggage, if placed by him in the custody of the servants of the company, that the porter of a sleeper attached to a train, is for this purpose a servant of the company, and that baggage, placed in his hands by a passenger, is at the risk of the railroad company. And, further, that the liability of a railroad company is not avoided by its contract with the sleeper company, exempting the latter from liability, nor is it affected by the fact that exemption from liability for baggage was expressly stipulated in the sleeping car ticket. And in this ruling the court is very logical, for if the sleeper is *pro hac vice*, the servant of the railroad company, it cannot renounce liabilities of that company already incurred by the sale of the passage ticket. How far the sleeping car is an appendage of the train, and the railroad company responsible for it, is manifest from a ruling of the Supreme Court of the United States,[8] in which the railroad company was held liable for the consequences of the imperfection of a sleeping car attached to the train and occupied by its passengers, one of whom was hurt by the falling of an upper-berth. The company was bound to furnish safe and suitable cars, irrespective of their ownership; and, upon the same principle, it is equally bound to furnish honest and competent custodians of the baggage of its passengers.

It is well settled that the liability of a railroad company, for the baggage of passengers, (properly so called,) is that of a common carrier of goods, and not as narrow as that which it incurs for the safety of the passenger himself.[9] The act of God, or of the public enemy, or of the owner himself, in the absence of any limiting statute, like the English "Carrier's Act," can only exonerate the carrier. The baggage for which a railroad company is responsible, by reason of its contract to carry the passenger, includes only articles intended for personal use. What that embraces is a question too broad for consideration in this connection. Merchandise for sale is not included.[10] Jewelry intended to be worn by the passenger has been held to be baggage for which the carrier is liable.[11] A reasonable amount of money may also be carried in a trunk as baggage, for which the carrier will be responsible,[12] but what is "reasonable" is a matter of question. Four hundred and thirty-nine dollars was held to be an unreasonable amount,[13] and in Connecticut sixty dollars was held to be too much, as the passenger was only going from Waterbury to Bridgeport.[14]

There are many like decisions, distinguishing the kind, quantity and value of property which may, or may not, be regarded as baggage; in Kansas the Supreme Court has held that what the station agent receives as baggage *is* baggage, and that his acceptance fixes the liability of the company.[15] In that

[5] Angel on Water Courses, § 9, 17.
[6] Louisville & N. etc. Co. v. Katzenberger, June 10, 1886, 1 S. W. Rep. 44.
[7] 22 Cent. Law Journal, 505.
[8] Pennsylvania, etc. Co. v. Roy, 102, U. S. 452.
[9] Story on Bailments, § 499, and cases cited; Macrow v. Great Western, etc. Co., L. R., 6 Q. B. 612.
[10] Stimson v. Connecticut, etc. Co. 98 Mass. 83; Parmalee v. Fisher, 22 Ill. 212; Hawkins v. Hoffman, 6 Hill, (N. Y.), 586.
[11] McGill v. Howard, 2 Penn. St. 451; Brook v. Pickwick, 4 Bing. 218.
[12] Johnston v. Stone, 11 Humph. 419.
[13] Davis v. Michigan, etc. Co., 22 Ill. 278.
[14] Hickox v. Naugatuck, R. R. Co., 31 Conn., 281.
[15] Chicago, etc. Co. v. Conklin, 3 Pac. Rep. 762.

case the property in question was open to inspection, and was manifestly *not* baggage in any proper sense of the term. The rule can hardly be fairly applied in cases in which the property is locked up in a trunk, or otherwise concealed from the inspection of the agent.

The question, however, in the Tennessee case, was not whether the property in question was baggage, technically, or not, but whether the railroad company was responsible for the loss of it when in charge of the sleeping-car porter. A Massachusetts case,[16] is in accord with the Tennessee ruling, except that the court implies that if the passenger had known that the sleeping car was not owned by the defendant railroad company, nor under its exclusive control, the result might have been different. It is probable that if it had been necessary to the decision of the case, the Massachusetts court would have taken the ground assumed by the Supreme Court of Tennessee. Manifestly the sleeping car company, its agents, conductors, and porters, acting in subordination to the railroad company, ministering to the comfort and convenience of its passengers, and going, coming, stopping, and starting, at the will of the railroad company, are in a legal sense the servants of that company *quoad* its passengers. Whatever contract may be made between the two companies as to liability for lost baggage, is binding upon both, but in no respect obligatory upon passengers, nor are they bound by any other contract expressed on the ticket or otherwise, unless they have agreed to the terms of such contract. This is expressly held in an Ohio case,[17] in which the company insisted that the plaintiff was bound by the notice on the ticket that the company limited its responsibility for loss to one hundred dollars, and that the acceptance of the ticket was an assent to that limitation. In a case involving the same point,[18] Mr. Justice Davis said: "The considerations against the relaxatiou of the common law responsibility by public advertisement apply with equal force to notices, having the same object, attached to receipts given by carriers on taking the property of those who employ them, into their possession for transportation. Both are attempts to obtain, by indirection, exemption from burdens imposed in the interests of trade upon this particular business. It is not only against the policy of the law, but a serious injury to commerce—." And railroad tickets and checks are within the same rule. Neither a ticket nor a check is evidence of an agreement. The ticket is a voucher that the holder has paid his fare, the check, that he has delivered his baggage.[19] In a New York case, Denio, J-, said: "The tickets do not purport to be contracts. They are rather in the nature of receipts for the separate portions of the passage money; and their office is to serve as tokens to the persons having charge of the vessels and carriages of the company to enable them to recognize the bearers as parties entitled to be received on board. They are quite consistent with a more special bargain."[20]

In England, however, it has been held, by the House of Lords,[21] that where a ticket had printed on its face only the usual matter, *e. g.*, "Dublin to Whitehaven," etc., and on its back contain conditions, there being upon the face no reference to the back, not even the customary "over," the passenger was not bound by the conditions, but the face was held to express the whole contract of the parties. In another later case the ticket was in the form of a little book, on the first page was the usual ticket matter, on the second, certain conditions, among them the condition in controversy. Lord Coleridge held that the case was not controlled by the case of Henderson v. Stevenson, that, because the book was a continuous work, each page was to be read after the preceding page, and the whole formed the contract of the parties. This ruling, it strikes us, is a remarkable exercise of the power to

"—— distinguish and divide,
A hair twixt north and north-west side."

The Tennessee case under consideration, proceeds upon a new principle, and we think, the correct one, that the sleeping car is an adjunct of the passenger train, that its con-

[16] Kinsley v. Lake Shore, etc. Co., 125 Mass. 54.
[17] Baltimore and Ohio R. R. Co. v. Campbell, 36 Ohio St. 647.
[18] Railroad Co. v. Manfg. Co., 16 Wall. 318.
[19] Lawson on Carriers, § 106, 107.
[20] Quimby v. Vanderbilt, 17 N. Y. 306.
[21] Henderson v. Stevenson, L. R. 2 Sc. & Div. 470.

ductor and porter, servants of the sleeping-car company, are also servants of the railroad company, which must answer for them as for their other servants. The passenger may therefore have two remedies for loss or robbery on a sleeping car, one against the sleeping car company, the subordinate, the other against the railroad company, the superior.

EXCUSABLE NEGLIGENCE — WHAT WILL RELIEVE THE MAKER OF A NEGOTIABLE INSTRUMENT FROM HIS LIABILITY TO A BONA FIDE PURCHASER.

I Introductory.
A. Law as it now exists.
B. Maxim. If one of two persons must suffer etc. as interpreted by some courts.
II. Signing name to a note when intending to sign some other instrument of writing.
1. Relying upon the statements of others as to what it is.
2. Different Views.
A. First View.
B. Second View.
C. Third View.
III. Signing with the intention of signing a note but deceived as to its amount.
1. How different courts draw distinction.
A. Instances.
IV. Signing and not reading because unable to read.
V. Other circumstances which will relieve the maker.
VI. Reason why no general rule can be drawn.

I. *Introductory.*—A. Where it is shown at the time of the signing and delivery of the note that the maker was induced by fraudulent representations as to the character of the paper, to believe that he was signing and delivering an instrument other than a promissory note, or when he intends to sign a promsory note but is fraudulently tricked into signing a different note from that which he intended, if his conduct in signiug the instruments was not attributable in whole or in part to his own negligence in the premises, he is not liable even to *bona fide* holder.

Such is the law of perhaps the majority of the courts. The doctrine, is of new and recent date, in 1869 the leading case of Foster v. Mackinnon[1] was decided, and it may be classed as the first; and what is very remarkable among all the cases holding such to be the law, is their wonderful similarity both as to the *subject matter* for which the notes were given, and the frauds practiced in obtaining them. Patent wire fences,[2] patent wagon tongue supporters,[3] patent sulky wheel cultivators,[4] patent screw hay fork,[5] patent family medicines,[6] patent seed drill,[7] patent plows,[8] patent pruning shears,[9] patent washing machines,[10] patent churns,[11] patent clothes wringer, etc; were the articles for which the unsuspecting victim was persuaded to take an "agency," and then relying upon the honesty of the agent signed (what he supposed contract of "agency,") a note without reading it.

To carry the similarity of these actions farther it will be found that in almost every instance the unsuspecting farmer is the victim. Having about exhausted the patent right fraud, the ingenious swindlers are now dealing in Bohemian Oats and Red-line Wheat etc.

The law says that in these cases the maker of the note is not liable even to a *bone fide* holder if guilty of no negligences in attaching his signature; and that whether or not there was such negligence is a question of fact for the jury under proper instructions of the court.

B. But how can a person attach his signature to a negotiable instrument and not as a matter of law be guilty of negligence? It is a well known principle of law that when one of two innocent persons must suffer, he who has committed acts, without which acts the wrong could not have been done, and by the aid of which acts the wrong was done, he who has committed such acts, enabling the wrong to be done, must suffer. No one will, or can question the justice of this rule. For what reason should the maker of a negotiable instrument not be judged by this rule.

[1] L. R. 4 C. P. 704. Bigelow on Notes and Bills.

[2] Ort v. Fowler, 31 Kan. 478.
[3] Super v. Peck, 51 Mich. 563.
[4] Anderson v. Walter, 34 Mich. 113.
[5] Cline v. Guthrie, 42 Ind. 230; Gibbs v. Linsabury, 22 Mich. 483.
[6] Williams v. Stoll, 79 Ind. 80.
[7] Ross v. Doland, 29 O. St. 475.
[8] Winchell v. Crider, 29 O. St. 481.
[9] Perkins v. White, 36 O. St. 531.
[10] Nat'l. Bank v. Johns., 22 W. Va. 506; Phelan v. Moss, 67 Pa. 67.
[11] Auten v. Gruner, 90 Ill. 301.

Why should it not be said as a matter of law, that as he attached his name to the instrument and thereby brought it into existence, and thus gave the means of committing the fraud, the maker should bear the loss, and not the *bona fide* holder.

But the Supreme Court of Michigan,[12] has interpreted the maxim and says that it does not apply to this kind of cases. This Court says, that the maxim supposes the action of the persons upon whom it imposes the loss to have proceeded from intelligence, and not to have been the result of duress. It presumes the assent of the will of the actor. If from any cause, the assent of the will is wanting, the result is the same as if the act were done under duress, or by an insane man.

C. While this may be a true exposition of this maxim under the views of that court yet it does not appear plain to me, why a person, able to contract and not under duress is not guilty of negligence, as maker of a promissory note, to a greater extent, then a *bona fide* holder.

Not being able to see how the maker could attach his signature and not be guilty of negligence. I have used the term "Excusable negligence" as being a more appropriate term to apply to those cases where the maker has been held not liable to a *bona fide* holder of his negotiable paper which bears his signiture.

II. *Signing Name with the Intention of Signing an Instrument of Writing other than a Promissory Note.*—1. What diligence must the maker of a promissory note use in attaching his signature? Will the mere relying upon the reading and word of a stranger be such negligence as will make the party so relying liable for the amount of the note in the hands of a *bona fide* holder? If able to read, must he read it, or if unable to read must he have it read to him, and if so, who must he have to read it to him? A person is betrayed or tricked into signing something which he never intended to sign, who is liable? Courts are not united upon their answers to these questions nor in their reasons for them. One class of courts holds that if the makers signature is genuine, no circumstances except perhaps duress and ability to contract, will excuse him.[13]

The other class which holds that there may be circumstances which will excuse the maker where his signature is genuine, arrive at this conclusion from different reasons and in different ways, and it is to this class of decisions that the remarks of this article are addressed and we will now proceed to consider the different views and the decisions under them.

2. *Different Views.*—A. One view is that as the maker never intended to execute the bill or note, it can not be considered his act, and he should not be held liable thereon, any more than if his name had been forged to such instrument.

The best exposition of this view, perhaps, is the case of Gibbs v. Linabury,[14] where the court says; "When the defendant unwittingly signs an instrument in the form of a negotiable promissory note, relying upon false representations made to him at the time, that the instrument he is signing is a mere duplicate of a contract just previously signed by him, making him an agent for the sale of a patent hay fork, under circumstances devoid of any negligence on his part, and where fraudulent means are taken to prevent him from noticing the body of such pretended duplicate, and he delivers the same in ignorance of its true character, believing it to be a mere duplicate contract which he supposed he had signed, such instrument is to be regarded as a forgery, and can not be enforced" in the hands of a *bona fide* purchaser. In Anderson v. Walker[15] the following language is used. "If the defendant never intended and never agreed to sign a note or give one, and did not suppose or believe he was signing one, but was in fact only to sign, and believed he only was signing, the paper he had heard read, appointing him agent to sell cultivators, it is somewhat difficult to see how he could be held liable upon this note; and it is equally difficult to see how a man signing under such circumstances and belief could at the same time be considered negligent. If he had not agreed to sign a note, but to sign, and believed he was signing, other papers, which he had heard read, and

[12] *Supra*, 5.

[13] National Bank v. Johns, 22 W. Va. 506; 46 Am. R. 511 and cases there cited. Daniel on Neg't Instruments § 850.

[14] *Supra*, 5.

[15] *Supra*, 4.

which in no way resembled in size or appearance a note, and which by no possibility could be tortured into a negotiable instrument, or by any ordinary change converted into one, he could not be guilty of negligence in so signing, even if it afterwards turned out in some mysterious manner that one of the papers he supposed he was signing was a note. Under such circumstances he had no intention of signing a note, but an instrument of an entirely different shape and tenor; that it should turn out to be a note would certainly be through no fault or caution, or want of caution on his part."

a. These courts lay down the further proposition of law that when a party to an instrument undertakes to read it over in the presence and hearing of the party thereto, in order that he may understand its contents before signing it, the party reading is both legally and morally bound to read it correctly, and that the other party has a right to rely upon its being so read and need not examine it himself. Ordinarily no negligence can be attributed to one who signs papers, after having so compared them, with further examination.

b. *Instances.*—In Atchison v. Taylor,[16] the signer could not read without great difficulty and he asked the payee's agent to read it for him, and he misread it. Held, that the signer was not liable to a *bona fide* transferee. The court said; "If he is unable to read or does so with difficulty, then he may avail himself of the usual means of information, by having it read by some person present; while this may not be the precaution which would have been observed by an unusually cautious man, still we think he acted as the great mass of men not in, or educated to business, act, in such cases."

In Griffiths v. Kellogg,[17] the payee's agent misread the amount of the note to the maker, a woman; she did not read because she was unable to without her glasses and they were at the house of a neighbor; two of her children were present who were able to read, but she did not ask them. This was submitted to the jury and they found for the defendant, which was affirmed by the higher court.

[16] 54 Ill. 196; 5 Am. R. 118.
[17] 39 Wis. 209; 20 Am. R. 48.

In Soper v. Peck,[18] it was shown that there was nothing said whatever about a note, that the agent informed him (deft.) that it was; "Nothing more than a statement that he wanted to send to the company to let them know who was their lawful agent," that he signed the paper in an ordinary sized note book; it was opened out like a note book; that he sat down by the gate post and signed it, and the man said nothing to him while he was signing it, and that he took the book in his own hands when he signed it; that he could have gone to the house and got his spectacles and examining the paper if he wanted to; that he supposed it was just as the man represented, and it was not necessary. In reviewing this case the Court says; "It can not be disputed but that the evidence of the defendant tended to show that he had a fraud practiced upon him, and that very probably he had put his name to a note when he supposed he was signing something entirely different. If the jury believed this, he was entitled to their verdict, unless his negligence was so gross as to preclude his making the defense against a *bona fide* holder.

The other cases adopting this view are cited in the notes.[19]

B. A second view is, that it is always a question of fact for the jury whether under the circumstances, the party was guilty of negligence.

Perhaps the clearest exposition of this view is the case of Martin v. Smylie,[20] when it was shown that the defendant signed a note without reading, and it did not appear from the testimony that he could not read. The court left it to the jury to say whether the signature was without fault or negligence and they found for the defendant which was held not to be error, by the Supreme Court upon appeal. Hopkins v. Hawkeye Ins. Co.,[21] may also perhaps be said to come under this class, in which it was said that what constitutes reasonable care and diligence in the execution of an instrument is a question of fact

[18] *Supra*, 3.
[19] Foster v. McKinnon, L. R. 4 C. P. 704; Whitney v. Snyder, 2 Lans, 477; Citizens Nat'l Bank v. Smith, 55 N. H. 593; 3 Cen. Law Jour. 163; Walt v. Pomeroy, 20 Mich. 425; Detwiler v. Bish, 44 Ind. 78; Walker v. Egbert 29 Wis. 194.
[20] 55 Mo. 577.
[21] 57 Ia. 203.

for the jury, and where one trusts to an agent of the payee to read a note correctly, it is not as a matter of law negligence. In this case the defendant was unable to read the note on account of the absence of his spectacles. Whether he was justified in relying upon the reading of the agent, and in neglecting to call upon his wife or son who were present, constitutes not a question of law but one of fact. The question is, did he act as persons of reasonable and ordinary care would usually do under like circumstances. If he did, he was not negligent.

C. A third view is, that as a matter of law one must be adjudged guilty of such negligence as to render him liable who possessed of all his faculties and able to read, signs a note or bill relying upon the reading of a stranger that it is a different instrument.

Perhaps the larger number of the courts adopt this view.

Chapman v. Rose,[22] may be considered as the leading case adopting this view. This was a hay-fork case. The defendant thought, and was made so to believe by the agent that he was signing a contract of agency and relying upon such statements and belief he signed what afterwards turned out to be a promissory note. Here the Court says: "If it be objectd that there must be a duty of care in order to found an allegation of negligence upon the neglect of it, it must be answered that every man is bound to know that he may be deceived in respect to the contents of a paper which he signs without reading. When he signs an obligation without ascertaining its character and extent, which he has means to do, upon the representations of another, he puts confidence in that person; and if injury ensues to an innocent third person by reason of that confidence, his act is the means of the injury, and he ought to suffer.

In Peterson v. Macky [23] it appeared that Peterson supposed he was signing a receipt for a plow, it was read to him by the agent, and read as a receipt; Peterson could not read English and there was no one within a half-mile who could do so. Held that he was liable to a *bona fide*, transferree. The Court said; "Where a party, through neglect of precautions within his power, affixes his name to that kind of paper without knowing its character, the consequent loss ought not to be shifted from him to a *bona fide* purchaser of the paper.

Tested by this rule, the facts the defendant offered to prove would have been no defense. He signed the paper voluntarily. He was under no controlling necessity to sign without taking such time as might be needed to inform himself of its character. If he could not read it himself, there was no reason, except perhaps his own convenience or haste, why he should not postpone signing until he could have it read by some person upon whom he had a right to rely. Instead of doing that, he chose to rely upon an entire stranger, the party opposed to him in interest and the only person under temptation to deceive him as to the character of the paper he was asked to sign. One who without any necessity so misplaced his confidence ought not to be heard to claim that the paper he is in consequence mislead to sign should be taken out of the rule protecting commercial paper."

In William v. Stoll,[24] the evidence showed that two strangers came to the defendant's house, where he and his two sons were at work; that they wished the defendant to take an agency to put up bills and sell patent medicines; that he told the strangers that he was old and could not read or write, and could not be their agent. The strangers then said they would appoint his son, who was a minor, which was finally agreed to. They then said, as the son was a minor, it would be necessary for the father to sign the contract, which he did, relying upon the representations of the strangers. Held, that he was guily of negligence in not requiring one of his two sons, who were present and could read, to read the instrument.

In Douglass v. Gnatling,[25] the facts were substantially similar to the above case, except that it did not appear that there was one present who could read. The defendant was held liable. The court observing: "It is better that the defendant, and others who so carelessly affix their names to paper, the character of which is unknown to them, should suffer from fraud which their reckless-

[22] 56 N. Y. 137.
[23] 29 Ia. 408.
[24] 73 Ind 518.
[25] 55 N. H. 593.

ness invites, than that the character of commercial paper should be impaired and the business of the country thus interfered with and unsettled."

In Ruddel v. Dillman,[26] it was held that where one signs a negotiable note, relying upon the fraudulent representations of the payee that it is something different, and makes no effort to ascertain its tenor, whether he can read or not, he is liable to a *bona fide* holder.

In Citizens Nat. Bank v. Smith,[27] the defendant was an old man of limited education and poor eyesight, and not in the habit of writing, except to sign his name. His daughter, an intelligent woman, was present when the note was signed, and had the opportunity to read it, but was not called upon by the defendant to do so, and did not do so. It was held that the defendant was bound by reason of his negligence.

However, in Webb v. Corwin,[28] where it appeared that the defendant was very weak, sick, and nervous, and his eyesight was so dim from disease and old age that he could not read either print or writing, and he had lost his glasses, and so told the parties; that there was no party in the defendant's house at the time but himself and the strangers; that they said they would read it to him, and he relied upon them to read it correctly; that one of them pretended to read the contract to him; and as it was read it purported to be only a conditional agreement. Held that the defendant was not bound.

It has also been decided that the mere finding of the fact that the defendant was unable to read, was not enough, and was not equivalent to a finding that he was free from negligence.[29]

The decisions under this view are based upon the maxim that where one of two innocent persons must suffer, he who has given the means by which the fraud was committed must suffer, and are in direct opposition in their reasonings, (if not in their results,) to those courts that hold that this maxim does not apply, as will be found in most, if not all, of those which adopt the first view.[30]

Space will not permit more than a reference to the other cases adopting the third view. It seems to me if the maker can at all be excused, as between himself and a *bona fide* purchaser, this view is the preferable one.

III. *Signing with the Intention of Signing a Note, but Fraudulently Induced to Sign a Note for a Larger Amount than Intended.*—1. The courts adopting the first and second view above designated, have found it necessary to draw a destinction between, where a person intends to sign a note of some kind and where he intends to sign none at all but does sign one, believing at the time that he is signing another kind of a contract. They have been compelled to make the distinction for the reason that where a man willingly attacks his own signature it can not be a forgery.

A. *Instances.*—In Rowland v. Fowler,[31] it was held that he who signs a note although he misunderstood its effects or was induced by fraudulent representations to execute it, is liable to a *bona fide* purchaser, irrespective of the question of negligence.

To the same effect is Whitney v. Snyder.[32] In Savings Bank v. Steffes[33] the question is "dodged" and Griffith v. Kellogg[34] heretofore quoted from, and Bowers v. Thomas[35] are directly to the opposite. In the latter case the evidence showed that the defendant could not read the instrument he was called upon to sign; that the other signer was the father of the person for whose benefit the note was made and he could not read it; but was a man in whom the maker had confidence. The only person present when the note was made was the son for whose benefit the note was made; and that it was read over to him as a note for $100,00, when it was a note for $180,00. Held, that if guilty of no negligence he was not liable.

The general rule however seems to be, where the distinction, is at all made, that of the Connecticut Court.[36]

[26] 79 Ind. 80.
[27] 29 Minn. 298.
[28] 78 Ind. 403.
[29] Perkins v. White, 36 O. St. 531.
[30] Dinsmeri v. Stimbert, 12 Neb. 433; Cole v. Williams, 12 Neb. 440; Putman v. Sullivan, 4 Mass. 45; DeCamp v. Hamma, 29 O. St. 471; Winchell v. Crider, 29 O. St. 484; Shirts v. Over John, 60 Mo. 305; Millard v. Barton, 13 R. I. 601.
[31] 47 Conn. 347.
[32] 2 Lans. 477.
[33] 54 Ia. 214.
[34] 39 Wis. 219.
[35] 62 Wis. 480.
[36] *Supra*, 32.

IV. *Signing and not Reading because not able to read.*—Some courts mostly those adopting the third view make a distinction in cases where the maker is unable to read, and where he can read. There is however no uniformity upon this question as will be seen from the cases above cited and quoted from. These courts which excuse the maker where he signs that which he does not intend to sign, upon the ground that the instrument is a forgery, will probably make no distinction, while those excusing him but not on that ground, may sometimes draw the distinction.

A writer reviewing some of the cases upon this subject, thinks there is no good reason for any distinction; that one who cannot read is more liable to be selected as a victim by the straggling sharpers, and he ought, before becoming a party to a written obligation, and especially with a stranger, to have its contents examined by some person in whom he may reasonably place confidence; and even then, if his confidence should be misplaced he ought to suffer for the wrongful act of his agent, rather than be allowed to shift the burden to the shoulders of a *bona fide* holder.[37]

V. *Other Instances.*—The maker is excused in all instances where there is a material alteration or where it is forged or procured by fraud and duress or where there never was a delivery of the instrument. Upon the latter proposition like many other noticed in this contribution, courts are somewhat divided.

What is a material alteration, a forgery or a non-delivery or duress, such as will relieve the maker or *bona fide* holder, the limits of this article will not permit me to discuss. The inquiring reader will find that decided and discussed in some of the cases cited in the notes.*

VI. It is extremely difficult, if not impossible to formulate any rules in reference to what circumstances will release the maker, as between himself and a *bona fide* holder.

The law for each State can only be judged by the decisions of its own supreme Court.

These divergent reasonings and very often similar conclusions of the different courts upon this question seem to have arisen from a great desire to thwart a great wrong that was being carried on. Being a new thing it arose in quite a number of different courts at the same time, and without precedent they worked out their own conclusions, and very naturally from different reasons.

The ingenious scheme whereby a person was induced to sign that which he did not intend to, in the nature of a promissory negotiable note seems to have occurred at the same time in different parts of the world. The first case arose in England[38] in 1869, and in 1870 in June a similar case arose in the Supreme Courts of Ill.[39] and Ia.[40] which view both decided without knowledge of the English case. In the same year in Sept. it arose in N. Y.[41] and in April 1871 in Mich,[42] and in June of the same year in Wis.[43] Most of which decisions were made in ignorance of the others.

WM. M. ROCKEL.

Springfield, Ohio.

[37] Vol. 2 426, Cen. Law Jour.

[38] Foster v. MacKinnon, L. R. 1 C. P. 704.

[39] Taylor v. Atchinson, 54 Ill. 196.

[40] Douglass v. Matting, 29 Ia. 408.

[41] Whitney v. Snyder, 2 Lans. 477.

[42] Gibbs v. Linabury, 22 Mich. 483.

[43] Walker v. Egbert, 29 Wis. 425; Other cases bearing upon the subject. Nebeker v. Cutsinger, 48 Ind. 436; Fisher v. Behren, 70 Ind. 19; Penn. R. Co. v. Shay, 82 Penn. St. 202; Ruddell v. Phalor, 72 Ind. 533; Rogers v. Place, 29 Ind. 577; Lubright v. Fletcher, 6 Black 308; McCormick v. Molbury, 43 Ia. 561; Cole v. William, 12 Neb. 440; Brown v. Reed, 79 Penn. St. 370; Holmes v. Trumper, 22 Mich. 427; Caulkins v. Whisker, 29 Ia. 495; Garrard v. Hadden, 67 Pa. St. 82; Reddich v. Doll, 54 N. Y. 236; Abbott v. Rose, 62 Me. 194; Puffer v. Smith, 57 Ill. 527; Briggs v. Ewart, 51 Mo. 245; Aude v. Dixon, 6 Exch. 869; Mance v. Lery, 5 Ala. (N. S) 370; Shephard v. Hall, 7 Conn. 329; Clay v. Schawb, U. S. D. 1871, Vol. 11; Kellogg v. Seteiner, 29 Wis. 626; Gerrish v. Glines, 55 N.H. ——; Clark v. Johnson, 24 Ill. 296; Mead v. Munson, 60 N. Y. 49; Frederick v. Clemens 60 Mo. 313; Comstock v. Hannah, 76 Ill. 530; Cannon v. Canfield, 13 Cen. L. Jour. 156; and see authorties cited in a former article in this Journal on *bona fide* holder of negotiable instruments. Vol. 22, p. 437.

INTER-STATE GARNISHMENT — EXEMPTION LAWS OF STATE OF DOMICILE.

MISSOURI PACIFIC ETC. CO. v. MALTBY.

Supreme Court of Kansas, October 9, 1885.

In a proceeding in garnishment, where all the parties are non-residents of the State of Kansas, and are residents of the State of Missouri; and the thing attempted to be attached by the garnishment proceeding is a debt created and payable in the State of Missouri, but the garnishee does business in Kansas and is liable to be garnished in this State; and the other parties come temporarily into Kansas; and, while in Kansas, the plaintiff, who is a creditor of the defendant, who is a creditor of the garnishee, commences an action in

Kansas against the defendant, and serves a garnishment summons upon the garnishee; and the debt of the garnishee to the defendant is, by the laws of the State of Missouri, exempt from garnishment process, and such debt also seems to come within the exemption provisions contained in § 490 of the Civil Code of Kansas, and § 157 of the Justices' Code of Kansas, exempting certain earnings of the debtor from the enforced payment of his debts; *Held*, that such debt is exempt from garnishment process in Kansas.

Error from Bourbon County.

David Kelso and *J. H. Sallee*, attorneys for plaintiff in error; *Messrs. Ware & Ware*, attorneys for defendants in error.

VALENTINE, J., delivered the opinion of the court.

This was an action brought in the district court of Bourbon county, Kansas, by W. J. Maltby and A. N. Maltby, partners as Maltby & Co., against the Missouri Pacific Railway Company and Geo. W. Ridgway, to recover $116.40 from the railway company because of its failure to answer as garnishee in an action brought by Maltby & Co., against Ridgway, before a justice of the peace of said county. Ridgway and his family and Maltby & Co.. were all residents of Sedalia, Missouri, and the railway company was a Missouri corporation, but had been consolidated under the laws of Kansas, with two Kansas railway companies, and did business and operated railroads in Kansas. The action brought before the justice of the peace was for groceries sold and delivered by Maltby & Co. to Ridgway at Sedalia, Missouri. The garnishee summons was served on the agents of the railway company in Bourbon county, Kansas, on July 10, 1883, and the original summons was served personally on Ridgway in the same county on July 17, 1883. The defendant Ridgway appeared personally before the justice of the peace and also by counsel, and judgment was rendered against him and in favor of Maltby & Co. for $258.68. The railway company did not appear within proper time, but afterward appeared and filed a paper with the justice of the peace, claiming that it was not liable as garnishee; that the court had no jurisdiction over it; and that the sum due from it to Ridgway, to-wit: $58.20, was exempt from judicial process. The justice, however, refused to act upon the paper. At the time of the service of the garnishment summons upon the railway company, it owed Ridgway just $58.-20. Afterward Maltby & Co, commenced this present action against the railway company, also making Ridgway a defendant, claiming from the railway company $116.40, because of its refusal to answer as garnishee as aforesaid. The railway company and Ridgway answered in this action separately, each, however, claiming that the debt due from the railway company to Ridgway was exempt from judicial process: that the railway company was not liable to be garnished for the same; and that the railway company was not liable in the action. The case was tried before the district court without a jury upon an agreed statement of facts. Among the facts admitted were the following: "The money due from the said railway company was for the personal earnings of said Ridgway, and was due to him within sixty days of the beginning of this suit, and was for his personal earnings as engineer upon said railway Missouri, and necessary for the support of himself and family, and said wages are and were exempt from garnishment by the laws of the State of Missouri." "The family of said Ridgway consists of a wife and one child, who are dependent upon him for their support."

"Plaintiffs admit that an action could have been brought in the State of Missouri against said Ridgway, except while he was absent from the State, and that personal service could have been had on said Ridgway in said State, both before and after said suit was begun in Kansas; and that a garnishment summons might have been served in said State upon the defendant railway therein, and that garnishment proceedings against the defendant railway company might have been instituted in the State of Missouri, and that if such proceedings had been instituted, the defendant Ridgway would have by reason of the exemption laws of the State of Missouri, entirely defeated the collection of the plaintiff's claim."

Upon the agreed statement of facts the court rendered judgment in favor of Maltby & Co., and against the railway company for $58.20, and interest, amounting in all to $62.25 and costs.

A motion was made for a new trial and overruled, and proper exceptions were taken, and the defendants, the Missouri Pacific Railway Company and Ridgway, now bring the case to this court for review.

The first and principal question which seems to be involved in this case is whether the debt due from the railway company to Ridgway was and is exempt from garnishment process or not. It seems to be admitted by the parties that the laws of a State, including exemption laws, can have no extra territorial force; that no law can be imported into one State from another; yet, that all actions for debts or actions upon contract, wherever they arise, are transitory in their character, and may be brought in any jurisdiction where the debtor or his property may be found; also, that corporations doing business in this State, whether domestic or foreign, may be garnished in this State, and may be garnished by either a resident or non-resident plaintiff; and may also be garnished whether the action arose in this State or elsewhere; and whether the defendant is a resident or non-resident of the State; provided, of course, that the debt or thing attempted to be held in garnishment, is, or may be, the subject of garnishment proceedings. And it has been held by this court that a foreign corporation doing business in this State may be garnished by a person, presumably a resident of Kansas, for a debt due from the foreign corporation to a non-resi-

dent employe of the corporation, not present in Kansas, where the debt was created outside of Kansas, and was exempt from garnishment in the State where the defendant and the garnishee resided, and where the debt was created, but was not exempt under the laws of Kansas. B. & M. R. R. Co. v. Thompson, 31 Kas. 180; s. c., 47 Am. Rep. 497; s. c., 18 C. L. J., 192, and note, 194, *et seq.* But the plaintiffs in error, defendants below, claim that no person or corporation can be garnished with regard to property, or choses in action which are beyond the jurisdiction of the State, or are exempt from garnishment process in the State where the *situs* of such property or choses in action may be considered to be; that the *situs* of the debt in question is where it was created, where it was to be paid, and where all the parties reside; but it is also claimed by the plaintiffs in error, defendants below, that such debt is nevertheless exempt from garnishment process, whether its *situs* be considered as in Kansas, or in Missouri, or in both. It is claimed that the debt may be considered as in the nature of a trust fund set apart by the laws of Missouri for the use and benefit of the family of Ridgway, and that garnishment proceedings cannot reach to such fund so as to divert it from the purpose for which it was set apart. It is claimed that the exemption of this fund from judicial process is an incident to the debt itself or a condition thereof, which will follow the debt into whatever jurisdiction the debt itself may be considered as having passed; that the exemption being an incident of the debt is equally transitory with the debt. It is claimed that whenever a debt created under the laws of one State is carried into another, all its incidents and conditions are carried along with it. It is claimed that where the debtor ane creditor, and the garnishee are all residents of the same State, and the debt was created in such State, the exemption is not only such a condition or incident to the debt, that it will follow the debt wherever the debt may go; but also, that the relation or *status* existing between the parties by reason of the debt and the exemption laws of the State where all the parties reside, so follow the parties that if a part of such relation or *status* is enforced in any jurisdiction, all must be enforced—the exemption as well as the debt; and many of the various relations existing in society, such as marriage, agency, trusteeship, corporations, partnership, etc. are cited as illustrations of relations created under the laws of one State, and being recognized and enforced in other States. It is also claimed that the exemption is a vested right *in rem*, which follows the debt into any jurisdiction in which the debt may be considered going. It is also claimed that, because all the parties reside in Missouri,and the debt was created there and is payable there, and was exempt from garnishment process under the laws of that State; the debt should be held to be exempt in other States, under the rules of comity existing between States. The plaintiffs in error, defendants below, cite the following, among other, authorities: Pierce v. The C. & N. W. Ry. Co., 36 Wis. 283: Baylies v. Houghton, 15 Vt. 626; Tingley v. Bateman, 10 Mass. 343; Sawyer v. Thompson, 4 Foster (N. H.), 510.

The defendants in error, plaintiffs below, claim that the debt from the railway company to Ridgway is not exempt from garnishment process in Kansas, and cite, among other authorities, the case of the B. & M. R. R. Co. v. Thompson, *ante*, and the authorities there cited. That case, however, is not applicable to the present case for the following reasons: The plaintiff in that case was not shown to have been a resident of the same State as the defendrnt and garnishee, nor a non-resident of Kansas, and presumably he was a resident of Kansas. In that case it was not shown that the defendant had ever been in Kansas, nor was it shown that his earnings were necessary for the maintenance of his family, and presumably, they were not; and therefore, presumably, such earnings were not exempt from garnishment process under the laws of Kansas, and would not have been even if he had been a resident of Kansas.

We are inclined to think that the debt due from the railway company to Ridgway is exempt under the laws of this State. Seymour v. Cooper, 26 Kas. 539; Muzzy v. Lantry, 30 Kas. 49; Civil Code, § 490; Justices' Code, § 157. Under the sections above cited, the earnings of a debtor for his personal services at any time within three months next preceding the attempt to subject such earnings to the payment of his debts, are exempt from such payment if it be made to appear by the debtor's affidavit, or otherwise, that such earnings are necessary for the use of his family, supported wholly or partially by his labor, and no distinction is made by such sections between residents and non-residents, or between debts created in Kansas, and debts created elsewhere; and the weight of authority seems to be that where the statutes do not make any distinction, no such distinctions exist; that if the statutes do not restrict the exemtion of property for the payment of debts to residents or to some other particular class of persons, the courts have no authority to make such restriction; and the statute will apply to all classes—non-residents as well as residents. M. P. R. R. Co. v. Barron, 83 Ill. 365; Sproul v. McCoy, 26 O. St. 577; Hill v. Loomis, 6 N. H. 263; Haskill v. Andros, 4 Vt. 609; Lowe v. Stringham, 14 Wis. 222. And the case of Leiber v. The U. P. Ry. Co., 49 Ia. 688, seems to recognize this principle, though the question is not decided. See, also, Freeman on Executions, § 220, and cases there cited. And the garnishee may interpose the exemption as well as the debtor himself. Mull v. Jones, 33 Kas. 112.

But it makes no difference in this case, as both the garnishee and the debtor have interposed the exemption. Under the general exemption laws of Kansas (Comp. Laws of 1879, Chap. 38), it is

necessary that the party supposed to be entitled to the exemption should be a resident of this State; but such is not the case with regard to the exemption under § 490, of the Civil Code, and § 157 of the Justices' Code.

Not wishing to state the law more or less broadly than the facts of this case will warrant, we shall decide it purely upon its own facts; and, therefore, the decision will be, in substance, as follows: In a proceeding in garnishment, where all the parties are non-residents of the State of Kansas, and are residents of the State of Missouri; and the thing attempted to be attached by the garnishment proceedings is a debt created and payable in the State of Missouri, but the garnishee does business in Kansas, and is liable to be garnished in this State, and the other parties come temporarily into Kansas, and while in Kansas the plaintiff, who is a creditor of the defendant, who is a creditor of the garnishee, commences an action in Kansas against the defendant, and serves a garnishment summons upon the garnishee, and the debt of the garnishee to the defendant is, by the laws of the State of Missouri, exempt from garnishment process; and such debt also seems to come within the exemption provisions contained in § 490, of the Civil Code of Kansas, and § 157 of the Justices' Code of Kansas, exempting certain earnings of the debtor from the enforced payment of his debts; such debt is exempt from garnishment process in Kansas.

The judgment of the court below will be reversed and cause remanded for further proceedings.

NOTE.—In the foregoing case, the court goes only to the threshold of a very difficult and mooted question, the conclusion of the court being applicable only to the facts therein stated. Had it not been that the debt due from the railway company to the defendant was exempt under the laws of Kansas, then the question whether the debt was under the laws of Missouri exempt in the State of Kansas, would have been squarely presented for determination.

The recognition of the exemption statutes of one State by the courts of another is clearly within the doctrine of the extra-territorial force of laws. Such recognition is comity between the States, not a matter of obligation, but merely a matter of voluntary courtesy and favor, extended or withheld at pleasure.[1] Inherent in the law of comity between the States is the principle that whenever the statute law of one State is recognized and enforced in another, it is upon the presumption that it is not inimical to the laws of the latter, its policy or the interests of its people.[2] Comity extends only to enforce obligations, contracts and rights under provisions of the law of other States, which are analogous or similar to those of the State where the litigation arises,[3] and it is never extended to the laws of remedy, but has been generally regarded as extending to matters *ex contractu*.[4] In considering the recognition and enforcement of the exemption laws of one State by the courts of another, these principles of comity between the States must necessarily be studiously considered.

What would seem at once to negative the proposition or propriety of giving extra-territorial force to exemption laws is that such laws pertain to the remedy,[5] and the question of exemptions belongs to the law of the forum.[6] "Comity only requires that the tribunals of the State shall be open to citizens of other States as they are to its own, and that they shall enforce the same remedies and none other."[7] The most respectable text writers have said that the operation of exemption laws is restricted to the State in which they are enacted; that they do not constitute a part of the contract between the debtor and creditor to the extent that the former may invoke them wherever he may choose to go.[8]

It is now generally accepted that where the creditor and debtor reside in the same State, the former may be enjoined on the petition of the latter from going into another State to collect his debt, which, by reason of the exemption law of the domicile, could not be collected there.[9] This principle may furnish the strongest reason for the courts of one State to give force to the exemption laws of another, when a creditor, resident of the latter, slips from the jurisdiction of the courts of the former State and endeavors to evade its laws and collect a debt from a resident of his own State. This would furnish an opportunity for the practice of comity, not an obligation, but a mere matter of voluntary courtesy from the one State to the other.

The Wisconsin case,[10] in which the court attempts to give recognition to the doctrine that the exemption laws of one State will protect a resident thereof when sued in another State by one also a resident of the former, should not be recognized in any way as authority upon the question. That case is condemned by its statement that, in the absence of proof, the statute law of Illinois was presumed to be the same as that of Wisconsin. It has been severely and justly criticised as bearing on its face "unmistakable evidence of having been poorly considered and hastily written, and wholly unsupported by respectable authority."[11] Where a planter, a resident of Mississippi, but owning land in Alabama, had his horse seized under an attachment issued by a court of the latter State, it was held he could not claim the horse as exempt from seizure under the law of Alabama, such law being specially restricted to "every family" of that State; nor could he claim the benefit of the exemption law of Mississippi.[12] In the case of Morgan v. Neville,[13] the facts were there; Morgan owed Neville wages for labor contracted for and performed in Pennsylvania, and Neville owed Shannon for goods sold to him in Pennsylvania where the three parties resided. Shannon, finding Morgan in Maryland, sued out an attachment there and garnished Morgan for the amount due

[1] Rorer on Inter. Law, 4, Story's Conflict of Laws, (8th ed.) 8.

[2] Bank v. Earle, 13 Pet. 519; Story's Conflict of Laws, (8th ed.) 35, 168; Thompson v. Waters, 25 Mich. 214.

[3] Hughes v. Klingender, 14 La. An., 857; Woodward v. Roane, 23 Ark., 523.

[4] Rorer on Intern. Law, 168; Blanchard v. Russell, 13 Mass., 1; Story's Conflict of Laws, (8th ed.) 374; Greenwood v. Curtis, 6 Mass., 358.

[5] Newell v. Hayden, 8 Io., 140; Blanchard v. Russell 13 Mass., 1; Helfsentein v. Cave, 3 Io., 287.

[6] Wood v. Malin, 5 Halst. 208; Wittemore v. Adams, 2 Cow., 626; Toomer v. Dickerson, 37 Ga. 440; Haskell v. Andros, 4 Vt., 609; Coffin v. Coffin, 16 Pick., 323.

[7] Bank v. Trimble, 6 B. Mon., 599.

[8] Freeman on Executions, 209; Rorer on Inters. Law 53; Thompson on Homestead and Ex., 20.

[9] Snook v. Snetzer, 25 Ohio St. 516.

[10] Pierce v. Chicago etc. Ry. Co., 36 Wis., 388.

[11] 2 Cent. L. J., 378.

[12] Boykin v. Edwards, 21 Ala., 261.

[13] 74 Pa. St. 52.

from him to Neville, Morgan gave notice to this proceeding to Neville. Judgment was rendered against the garnishee by default, and the amount adjudged against him was paid over. Neville afterwards sued Morgan in Pennsylvania and it was there held that payment of the debt in pursuance of the judgment in Maryland was a good defense to the action. In Ohio and Iowa the same principle has been announced.[14] In the case of Lieber v. The Union Pacific R. R.,[15] the railroad company was indebted to the defendant debtor for wages payable in Nebraska, where the latter lived, and which was exempt under the law of that State, but was not exempt under the law of Iowa. The court enforced the law of the *forum*.

The question at issue has been discussed at length in note to the case of Burlington etc. R. R. Co. v. Thompson.[16]

W. A. ALDERSON.

[14] Baltimore etc. Ry. Co. v. May, 25 Ohio St., 347; Moore v. R. R. Co., 43 Io. 388.
[15] 49 Io., 688.
[16] 18 Cent. L. J., 192. See Article, 21 Cent. L. J., 425.

NUISANCE — CORPORATION CHARTER — RAILROAD—EASEMENT.

PENNSYLVANIA RAILROAD COMPANY v. ANGEL.*

*New Jersey Court of Errors and Appeals.**

1. A railroad company using, for the purposes of a terminal yard, a portion of a street over which it has only a right of way, is responsible for any nuisance, public or private, thereby created.

2. An act of the legislature cannot confer upon individuals or private corporations, acting primarily for their own profit, although for public benefit as well, any right to deprive persons of the ordinary enjoyment of their property, except upon condition that just compensation be first made to the owners.

3. A railroad company cannot justify the maintenance of a condition of things which directly renders a dwelling-house in the neighborhood unfit for a place of residence, upon the ground that the nuisance necessarily results from the convenient transaction of the company's lawful business, and such a nuisance will be prohibited by injunction.

This bill charges that the defendant uses its road, in the city of Camden, in such a manner as to create a nuisance, to the injury of the complainants. This nuisance, it is alleged, arises from the use of the several tracks, in distributing cars when loaded trains come in, and in making up loaded trains to go out from the main depot in the city. The noise of the trains, in stopping and starting, in the work of making up and distributing trains, the noise of the bells as they are rung, the noise of engine whistles, the noise of cows and calves bellowing, lambs and sheep bleating, and pigs smelling, and the smoke, dust and cinders cast from the engines, it is alleged, constitute a nuisance to the complainants, who live in the immediate vicinity, and on the line of the street through which the road passes, and right by, where the work complained of is done.

The testimony shows that the defendant has three main tracks through Bridge avenue, in the city of Camden, for the use of their engines and cars. It has also a track called a "siding," used for shifting cars from one main track to another, and for distributing their cars, and for making up trains. This "siding" terminates at the residence of the complainants. At the point of termination is a switch. When freight trains arive, they frequently are stopped at or near to this switch, and the cars containing different kinds of merchandise or live stock are, one after the other, or in parcels, distributed to different places at the main station on the banks of the Delaware river. This distribution is made by repeated forward and backward movements of the engine and train, the number of times repeated depending upon the length of the train, and the variety of freight. This work requires also the ringing of the engine bells, the blowing of the engine whistles, the emission of more or less steam, and the discharge of large quantities of smoke. The same process is applied in making up large freight trains for departure. Besides the ordinary freight, large numbers of cattle, sheep and swine are brought to the depot at Camden. This operation of making up and distributing the large freight trains, by means of the siding and switch named, brings the trains, and parts of trains, and engines, backward and forward frequently in front of the dwelling-house in which the complainants reside. In addition to the passing and repassing, these trains and engines are allowed to stand at or near the same locality for several minutes.

Mr. P. L. Voorhees, for appellants; *Mr. J. W. Wartman* and *Mr. J. J. Crandall*, for respondents.

Dixon, J. delivered the opinion of the court.

The complainant are owners and occupants of a dwelling-house on the southerly side of Bridge avenue, between second and third streets, in the city of Camden. The defendant's track run through the central part of Bridge avenue in front of complainants' dwelling, across second street, into its terminal yard, which extends from the westerly side of second street to the Delaware river.

The bill avers that the defendant uses its tracks in front of the complainants' house for the purpose of distributing cars and making up trains in its freight and passenger business, and that it keeps locomotives and cars laden with live stock standing there, so that by reason of the stenches, noises, smoke, steam and dirt thereby occasioned, the comfort of the complainants' home is seriously impaired, and hence they pray an injunction to restrain the defendant from continuing in that course of conduct.

The answer denies that the defendant uses its tracks in front of complainants' dwelling for the purpose of distributing cars and making up trains, and a siding for cars, loaded with live stock or otherwise, and generally, alleges that said tracks

*From advance sheets New Jersey Equity Reports.

are used only in such modes as the proper transaction of its business necessitates.

The evidence is clear that the tracks mentioned are continually used in the manner set out in the bill. The defendant's trainmaster, at Camden, testifying for the company, states that the company uses Bridge avenue above second street considerably for the purpose of drilling, and that he could not transact the company's business without doing so; that he is not in the habit of permitting cars loaded with cattle, sheep and swine to remain upon the track between second and third streets longer than he must, before getting them down into the yard after they come into the street. These occurances take place at various hours of the day and up to eleven o'clock at night; ordinarily, he says, not later than that time. The proofs presented by the complainants, and not controverted on behalf of the defendant, establish that the use of the tracks thus admitted results in the nuisance of which complaint is made.

The fact that these nuisances are continuous, and materially diminish the comfort of complainants in their residence, makes the case one proper for an equitable remedy by injunction, unless the defendant can justify its conduct. Ross v. Butler, 4 C. E. Gr. 294, and cases there cited.

The defendant s justification was rested, at the argument, upon the ground that the legislature and the common council of Camden had authorized the defendant to use Bridge avenue for its business, that its business requires such use as the defendant has hitherto made,and therefore the use cannot be, in a legal sense, injurious.

There are two sufficient answers to this claim. The first is that neither the legislature nor the common council has attempted to grant so exten sive a privilege as is here set up. The charter of the Camden and Amboy railroad Company, passed February 4th, 1830, authorized it to construct and operate a railroad, with all necessary appendages, within limits embracing the locality now under consideration. In 1834 the Camden common council, by resolution, authorized that company to use Bridge avenue for the purposes of its roadway. In 1855 the legislature (P. L. of 1885 p. 118; Rev. p. 919 § 65) authorized railroad companies, whose incorporating acts limited the quantity of land which they might hold at their stations, to purchase and hold so much land as might be strictly necessary for most conveniently storing and working upon their engines, cars, fuel and materials to be used on their roads, and for receiving and delivering property transported on their roads to the best advantage, and for tracks, wagon-roads, platforms, and all other strictly station and railroad purposes. In 1862 the city council, by "an ordinance to afford facilities to the Camden and Amboy Railroad Company for the running of their trains through the city of Camden," gave its consent and authority to the company to lay side tracks, running obliquely from a point on the railroad, along Bridge avenue, between second and third streets, to and upon the company's depot property lying west of second street. From these laws and regulations arise whatever rights the defendant, which is the lessee of the Camden and Amboy Railroad Company, appears to have in Bridge avenue, in front of complainant's house. In our judgment, they indicate that those rights are such as pertain to the use of the avenue for the purposes of a way, not for the purposes of a station-yard. The primary privilege given is that of passage; this and its reasonable incidents cover the whole scope of the grant. The right of storing engines and cars, either for a longer or a shorter period, the right of making up or breaking up trains, are not embraced in such a concession. These, are strictly station and terminal purposes, and by providing for station-yards the legislature has indicated its intention that business of that nature should be transacted there. We do not say that the company may not, under any circumstances, do upon its roadway what ought commonly to be pode in its yards; for, no doubt, unforseen occurrences may sometimes render such acts almost indispensable, and then other less urgent rights, of the public at least, must give way. But when, in the ordinary course of its business, the company devotes a portion of its roadway to station purposes, it goes beyond express legislative sanction, and can support itself, if at all, only as a private individual might. This is what the defendant did in Bridge avenue. Having a right of passage there, it used its tracks as though they were within its terminal yard, and so used them constantly in its every-day concerns. For this is no legislative or municipal authority.

But, secondly, an act of the legislature cannot confer upon individuals or private corporations, acting primarily for their own profit, although for public benefit as well, any right to deprive persons of the ordinary enjoyment of their property, except upon condition that just compensation be first made to the owners. This principle rests upon the express terms of the constitution. In declaring that private property shall not be taken without recompense, that instrument secures to owners, not only the possession of property, but also those rights which render possession valuable. Whether you flood the farmer's fields so that they cannot be cultivated, or pollute the bleacher's stream so that his fabrics are stained, or fill one's dwelling with smells and noise so that it cannot be occupied in comfort, you equally take away the the owner's property. In neither instance has the owner any less of material things then he had before,but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is the taking of his property in a constitutional sense; of course, mere statutory authority will not avail for such an interference with private property. This doctrine has been frequently enforced in our courts. In Trenton Water Power Co. v. Raff, 7 Vr. 335, Mr. Justice Depue said: "The destruction of private

property, either total or partial, or the diminution of its value by an act of the government directly, and not merely incidentally affecting it, which deprives the owner of the ordinary use of it, is a taking within the meaning of the constitetional provision. * * * The injuries to which immunity from responsibility attaches are such only as arise incidentally from acts done under a valid act of the legislature, in the execution of a public trust for the public benefit,by persons acting with due skill and caution within the scope of their authority. If the injury be direct,or the work be done for the benefit of an individual or corporation, with private capital and for private emolument, the principle which absolves the parties from liability to action at the suit of persons injured does not apply, even though the public be incidentally benefitted by the improvement." He cites several decisions in this State supporting the doctrine. In McAndrews v. Collerd, 13 Vr. 189, the chancellor declared, as the opinion of this court, that the proposition that the legislative authority to a private corporation or an individual to do a work for its or his own profit, includes authority to use, at whatever hazard to the persons orproperty of others, dangerous materials, provided they be necessary to the convenient prosecution of the work, cannot be sustained; that there is an obvious distinction between the liability of a private corporation to public prosecution for a legalized nuisance, and its liability to a private action for damages arising from such nuisance; that in the one case the legislative authority is a protection, and in the other it is not. To the same effect is the language of the Supreme court of the United States in Baltimore and Potomac Railroad Co. v. Fifth Baptist Church, 108 U. S. 317: "The acts that a legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest, and over which the public have control. The legislative authority exempts only from liability to suits, civil or criminal, at the instance of the state; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large."

It must not be gathered from these propositions that all those inconveniences, which are the necessary concomitants of the location of railroads in populous neighborhoods, are to be considered civil injuries. That railways shall be so constructed and operated is required by the unanimous consent of the community, and the annoyances thence unavoidably arising ere not of sufficient importance to be regarded as invasions of those rights of property which society recognizes and protects. They must be classed rather among those limitations which the social State imposes upon the enjoyment of private property for the common good. But if in any case these annoyances become so great as to destroy or substantially impair the legitimate use of private property, the person injured becomes entitled to redress. Even the common good must then yield to private right, unless compensation be made.

The decree and injunction below, following the prayer of the bill, are therefore, in the main, correct, but perhaps they may be interpreted as going further than they should, in that they absolutely forbid, under any circumstances, the use of defendant's tracks in front of complainants' premises for the purpose of distributing and shifting cars and making up trains, and putting and placing thereon cars laden with cattle, sheep and hogs. Such a use may, sometimes, in extraordinary emergencies, be unavoidable, and if it then should occasion a material injury to complainants, should be paid for in damages rather than be prohibited by injunction. The injunction should be against the use of those tracks, for the purposes indicated, in the transaction of the ordinary business of the defendant, leaving it at liberty to show, in response to any attempt to punish it for violation, that an occasional use was necessitated by an unforeseen contingency.

In order to make this modification, the decree below should be reversed, but without costs to the appellant. The complainants should recover their costs in the court below.

Decree unanimously reversed.

NOTE.—The maxim, *sic utere tuo ut alienum non laedas* is usually difficult to obey, and its observance is beset with many complications in the relations of railroad companies to adjacent proprietors. The tracks of railroads, however long, are of course narrow, and as the operation of the road is always noisy, and sometimes malodorous, it is not remarkable that questions of abuse or excess of chartered rights frequently arise between the railroad company and abutting land-owners.

It is well settled that the dedication of land to public uses as a street or common road, does not confer the right to lay railroad tracks upon it.[1] The dedication, or condemnation, of land for the purposes of a public street, confers only the right of *user* for the purposes of ordinary travel, the use of such street for railway purposes is an *additional* burden, and for this there must be a fresh dedication or condemnation, or at least appropriate compensation to him who owns the fee.[2] If however the fee has passed from the original owner, and is vested in the State or the city, then of course the original owner has no reversionary interest and no right on that ground at least to complain that the servitude of a railroad track has been added to the ordinary uses of a street.[3] And however the right may be obtained the railroad company cannot use it for purposes, or in a manner not clearly within the

[1] Indianapolis etc. Co. v. Hartley, 67 Ill. 439; S. C. 16 Am. Rep. 624; Redfield on Railways, (3 ed.,) § 76; Kucheman v. Railroad Company, 46 Iowa, 366; Barney v. Keokuk, 94 U. S. 324; Atchison etc. Co. v. Garside, 10 Kan. 552, 565.

[2] Williams v. New York Central etc. Co., 16 N. Y. 97; Heard v. Brooklyn,60 N. Y. 242; Porter v. North, etc Co., 33 Mo. 128; South Carolina etc. Co. v. Steiner, 44 Ga. 546.

[3] Heath v. Barmore, 50 N. Y. 302; Porter v. North etc. Co., *supra;* South Carolina etc. Co. v. Steiner, *supra.*

terms of the grant, either by its express words or by *necessary* implication from them.[4] Hence, in the principal case, the right of way granted to a railroad company to traverse a street as a part of its track did not include the right to make that street a "yard" for "making up" and "breaking up" trains, or as standing room for cars, detained or out of use.

A Georgia case[5] goes much farther than that under consideration. The soil of a street it was conceded belonged to the State, the city gave a railrod company the privilege of using the street as part of its track, and the legislature ratified the municipal act. Upon suits for damages by the property holders on that street the Supreme Court held that they could recover such damages upon the ground that any injury to property which deprives the owner of the ordinary use of it, is equivalent to a "taking" and entitles him to compensation. And the court says: "Trains, freighted, and driven by steam, with gusts of thick smoke through his windows, and screaming along in front of his door, may affect his health and destroy his peaceful enjoyment of his property." This is farther than any other court has gone in favor of the property holder and against the railroad. In that case the property owner did not own the soil of the street in front of his premises, nor was the injury compalined of, any thing more than the usual and necessary consequence of running a railroad.

In a Michigan case,[6] the true doctrine on this subject is thus stated: "An adjoining proprietor can never be entitled to recover from a railroad company, for the depreciation of the rental or sale value of his premises, because of the location of the track in the street, except upon the assumption that the location is, of itself, unlawful. As already stated, it is unlawful as to him if he owns the soil in the street; but if he does not, and the placing of the track there is permitted by competent authority, the incidental injuries he may suffer from the location of the track, and the proper and reasonable conduct of the business of the railroad company upon it, can afford no ground of action unless the statute gives one. * * * The railroad is not a public nuisance, and no right of action can arise against the company until by negligence or mismanagement, they do, or suffer to be done, something injurious to the abutting proprietor, which the permission to occupy the street will not justify." This ruling was re-affirmed in a later case between the same parties.[7]

It may be said that "every lot owner has a peculiar interest in the adjacent street which neither the local nor the general public can pretend to claim; a private right, in the nature of an incorporeal hereditement, legally attached to the contiguous ground, * * * * which can no more be appropriated against his will than any tangible property of which he may be the owner."[8]

The law, therefore, appears to be, that a railroad in a public street, is not a public nuisance, nor indictable as such;[9] that it may be so mismanaged as to be a private nuisance, as in the principal case under consideration, or "by ways innumerable, by acts of omission or commission:[10] that an owner of abutting property is not entitled to compensation for injuries suffered by reason of the location of a road in the street unless he owns the soil of the street; and that if he does own the soil of the street in front of his lot, he is entitled to such compensation, although he, or those under whom he claims, have long ago dedicated that soil to public uses for the ordinary purposes of street travel.

ED. CENT. L. J.

[4] Commonwealth v. Erie etc. Co., 27 Penn. St. 351.

[5] South Carolina etc. Co. v. Shiener, 44 Ga. 546.

[6] Grand Rapids etc. Co. v. Heisel, 38 Mich. 62, 70.

[7] Grand Rapids etc. Co. v. Heisel, 47 Mich. 393; See also Moses v. Pittsburg etc. Co., 21 Ill. 516; Murphy v. Chicago, 29 Ill. 279; Stetson v. Chicago etc. Co., 75 Ill. 74; Chicago etc. Co. v. McGinnis, 79 Ill. 269; Elizabethtown etc. Co. v. Combs, 10 Bush. 382; Carson v. Central etc. Co., 35 Cal. 325.

[8] Lexington etc. Co. v. Applegate, 8 Dana. 294; Haynes v. Thomas, 7 Ind. 38; Elizabethtown v. Combs, *supra*: Protzman v. Indianapolis etc. Co., 9 Ind. 467; Stone v. Fairburg etc. Co., 68 Ill. 394.

[9] State v. Louisville etc. Co., 10 Am. & Eng. R. R. Cases 286.

[10] Grand Rapids etc. Co. v. Heisel, *supra*.

WEEKLY DIGEST OF RECENT CASES.

1. ADMINISTRATOR—*Official Bond—Surety — Liability of*—When an administrator, having resigned afterwards becomes his own successor, and a balance is decreed against him on settlement of the first administration, the distributees may, at their election, charge the sureties on either the first or the second bond. When an infant distributee is represented, on final settlement of an administrator's accounts, by a guardian *ad litem* regularly appointed, the decree is as binding on him as if he were an adult. On final settlement of an administrator's accounts, when the estate is not ready for settlement and distribution, a decree against him must be rendered in favor of the succeeding administrator *de bonis non* (Code, § 2595); and if he has been appointed his own successor, the probate court has, ordinarily, no jurisdiction to make the settlement. If the administrator is summoned to settle both administrations on the same day, and a balance is first ascertained against him on the statements of the accounts of the first administration, which at the instance of the distributees, is carried as a debt into the second, they cannot afterwards, by bill of equity, charge the sureties on the first bond with the amount of this balance, on the ground that the court, by reason of the antagonistic positions occupied by the administrator, had no jurisdiction of the first settlement. *Modawell v. Hudson*, S. C. Ala.

2. AGENCY—*Authority—Variation of Terms—Ratification—Knowledge—Earnest Money.*—Although a written authority directing agents to "sell" land

may not be sufficient to authorize a conveyance by the agents, it may be sufficient to empower them to make an executory contract for a sale which will bind their principals. When authority is given to sell on terms that the price should be payable "in" a certain time, a sale on terms of payment "on or before" said time, does not presume the authority given. To render a principal liable upon a contract in making whereof his instructions have been departed from as to terms, on the ground that he has ratified the same, he must have made the ratification with khowledge of the fact that he had not been obeyed. Where earnest money has been paid to agentmaking an authorized contract, the principal, who has not received the money, may disaffirm the contract without the necessity of seeing that the money is returned. *Jackson v. Badger*, S. C. Minn., March 1, 1886; 22 Rep, 122.

3. BENEVOLENT SOCIETY—*Beneficiary a Stranger.*—Defendant was incorporated under chapter 267, of the Laws of 1875, as amended by chapter 53, Laws of 1876. By its certificate of incorporation its object was declared to be: "To combine the efforts of all its members with the view to effect mutual relief, aid and systematic contributions of benevolence and charity during their life-time, and to their respective families from time to time, when rendered necessary by sickness or pecuniary distress. By its by-laws, passed in 1880, § 2: "The object of this society shall be to secure mutual benefit and protection to its members and to furnish aid to their families or assigns in case of a member's death." A certificate of membership was issued to H., payable on his death, one-fourth to his wife and three-fourths to plaintiff or his representatives. *Held*, that plaintiff, though not a member of H.'s family was entitled to recover; the contract was not one beyond the powers of the defendant. *Massey v. Mutual, etc. Society*, N. Y. Ct. App. June 1, 1886; 5 East. Rep. 810.

4. COMMERCIAL LAW—*Promissory Notes—Proof of Indorsement—Non-Suit.*—Where, in an action on a note, plaintiff made out his case by putting the note in evidence, and rested, and the defendant then moved for a non-suit on the ground that there was no proof of the indorsement of the note, plaintiff's counsel contending that no such proof was necessary, the court, upon deciding that proof of the indorsement was necessary, should have allowed plaintiff's request for leave to open the case, and introduce testimony concerning the indorsement, and a refusal so to do, and granting of a non-suit, where the effect thereof would be to compel plaintiff to commence a new action, to which the statute of limitations would be a bar, is error. *Low v. Warden*, S. C. Cal. June 17, 1886; 11 Pac. R. 350.

5. ——— ———. *Promissory Notes—Assignment—Notice—Evidence—Trial—Instructing Jury—Requests—Duty of Judge.*—In an action by the assignee of a note against the payee, who assigned by writing his name under that of the maker, instead of by endorsement, it is competent for plaintiff, in rebuttal of the claim brought out in the defense, to prove that defendant intended by his act to become a joint maker, and to waive notice. It is the duty of the court in instructing the jury to use, when possible, the precise words contained in the requests to instruct. *Cook v. Brown*, S. C. Mich. July 15, 1886; 29 N. W. Rep. 46.

6. CONSTITUTIONAL LAW—*Title of Act—Passage of Law—Legislature Journals—Errors in—Presumption that Bill was Read—House Journal—Third Reading of Bill—Enrollment of Statute.*—The title to an act of the legislature reads as follows: "An act authorizing the board of county commissioners of Ottawa county, and other counties therein named, to provide a fund, and appropriate the same, for the purpose of building county buildings in said counties." The "subject" of this act is the creation and use of a fund to build county buildings, and the body of the act expressly applies to the three counties of Ottawa, Washington, and Republic. *Held*, that the act contains only one subject, which is sufficiently expressed in its title, and is therefore not in conflict with that provision of § 16 of article 2, of the constitution, which requires that "no bill shall contain more than one subject, which shall be clearly expressed in its title." The bill was introduced in the senate, and read a first and a second time on the same day, and the senate journal does not show whether a case of emergency existed or not. *Held* that, although it is necessary, under § 15, of article 2 of the constitution, that "every bill shall be read on three separate days in each house, unless in case of emergency," yet that each house is the exclusive judge as to when a case of emergency arises or exists; and it is not necessary, in order that the reading of the bill shall be considered valid, that the emergency shall be stated upon the journal. From the legislative journals it appears there were several discrepancies or irregularities in the description of the bill, and the title to the bill, but *held*, that the same do not render the act as subsequently passed by the legislature, void. Nothing appearing showing that the bill was not read section by section on its final passage, as required by § 15 of article 2 of the constitution, *held*, that presumptively it was so read. Where the house journal shows expressly and affirmatively that the bill was placed upon its third reading, and that afterwards it "was read the third time," *held*, that it is sufficiently shown that the bill was read three times in the house. The enrolled statute is very strong presumptive evidence of the regularity of the passage of the act, and of its validity, and is conclusive evidence of such regularity and validity, unless the journals of the legislature show clearly, conclusively, and beyond all doubt that the act was not passed regularly and legally. *Weyand v. Stover*, S. C. Kan., July 9, 1886; 11 Pac. Rep. 355.

7. CONTRACT—*Divisible Contract—Part Performance*—Where a contract of sale contemplates and requires a performance in separable parts, and where the seller delivers an agreed proportion which the buyer accepts, and payment therefore becomes immediately due, the right to recover for such partial payment is at once complete and is not forfeited by a later default. The buyer cannot be compelled to accept a part performance in the inverse order of his contract, but only according to its terms; and where, at its initial point, the seller is in default, the right to rescind or abandon belongs to the buyer and applies to the whole contract remaining unperformed. *Pope v. Porter*, N. Y. Ct. App. June 1, 1886; 3 Cent. Rep. 451.

8. CONTRIBUTORY NEGLIGENCE.—*Burden of Proof—Facts Constituting*—Contributory negligence is a defense, the burden of which rests on the defendant although negatived by the averments of the complaint; and it must be affirmatively proved by the defendant, unless the plaintiff's own evidence establishes it. In an action by a railroad company

to recover damages for injuries caused by a collision of one of its trains with several empty cars left standing on a side-track by the defendants' servants, if the empty cars were left standing too near the main track, and a collision might have been avoided by the use of reasonable diligence on the part of the persons in charge of the passing train, the defense of contributory negligence would be made out, and in this connection the speed of the train and the fact that it had a watchman so stationed as to see and give notice of obstructions, or the want of these precautions, would be material factors; buf, if the empty cars, though not placed too near the main track, insecurely scotched on the down grade of the sidetrack, and being put in motion by the passing train, rolled down on it at the switch, the speed of the train would be immaterial, and contributory negligence could not be imputed to the plaintiff. *Montgomery, etc. R. R. Co. v. Chambers*, S. C. Ala. Dec. Term, 1885-86.

9. CORPORATION.—*Municipal Corporation — Evidence—Expert Testimony — When Admissible—Defective Ways—Injury to Person—Condition of Health after Accident—Damages—Personal Injury—Possibility of Recovery—Streets—Defects—Notice*—Testimony of an expert as to the nature of injuries, where the knowledge has been derived from an inspection of the injury, and from conversation with the person injured, is admissible. The testimony as to the condition of the health after an accident, of one claiming damages therefor, is admissible. Where there is a probability of a permanent disability, and a bare possibility that the disability would not be permanent, there is a sufficient basis for damages. It is the duty of the city, and not of "passers-by," to notice defects in streets and sidewalks, and repair them. In order to recover for an injury caused by a defect in a street, the plaintiff must show that the defect has existed for such a length of time as would have enabled the city to have discovered it by the use of ordinary care and caution. *Squires v. City of Chillicothe*, S. C. Mo. June 7, 1886, 1 S. W. R. 23.

10. CRIMINAL LAW.—*Aiding Prisoner to Escape—Intent to Liberate Particular Person.*—Under an indictment for aiding a prisoner to escape, a conviction may be had, whether an escape was effected or attempted or not; but it is not necessary that there shall be a specific intent to liberate any particular prisoner, although there must be an intent to liberate, and it must be found by the jury; nor is the consent of the prisoner a necessary ingredient to the offense. In delivering the opinion of the Court, upon the latter point, Stone, C. J. says: "Is it necessary to a conviction that there shall be independent proof that the accused had the specific intent to aid the particular prisoner to escape? Can the offence be committed without the consent of the prisoner? The first of these questions we answer in the negative. All men are presumed to intend the natural consequences of their acts. All men are presumed to be averse to involuntary confinement, and to desire liberty. So, if a prison be opened or so broken as to allow the inmates to escape, this would be proof of a general intent, and would authorize the jury to find a specific intent to liberate each and every prisoner confined therein. And on the same principle, we answer the second of the above questions in the negative. The intent to liberate, however, must exist, and must be found by the jury. We have shown above that a general intent is enough, and have also stated that the jury may infer such intent from any intentional breaking, or assistance in an attempt to so break the prison as that the prisoners confined therein can escape." *Hurst & Hill v. State*, S. C. Ala. December Term, 1885-86.

11. ———.*Homicide — Self-Defense — Hostility of Parties—Depositions—Criminal Case — Admissibility.*—Where it clearly appears that the accused and deceased had lived in avowed, open hostility, each going armed in anticipation of a deadly assault from the other, it is wholly immaterial which of them struck the first blow, on the occasion of an actual encounter between them fatal to either. Depositions taken in the presence of the accused, and where he had the opportunity of cross-examination, may be afterwards used on the trial, if at the time of using them the deponent is absent from the jurisdiction, or is dead. *Sneed v. State*, S. C. Ark. June 5, 1886; 1 S. W. Rep. 68.

12. ———.*Indictment—Statutory Offence—Gaming—Broker Acting in Option Deals.*—An indictment which merely follows the language of the statute, in charging an offense created by the statute, is good. Under the laws of Arkansas—act of March 20, 1880, (Mansf. Dig. §§ 1848, 1849)—a broker, or middleman, operating between buyer and seller, and bringing them together for the purpose of dealing in "grain futures," no *bona fide* sale and delivery of property being intended, is a gambler, even though he merely receives a commission on the sale, and has no other interest in the transaction. *Fortenbury v. State*, S. C. Ark. June 5, 1886, 1 S. W. Rep. 58.

13. ———.*Perjury—Time, Place, and Details Testified to in Alleged Perjury not Immaterial Issues—Conclusion of Indictment—Formal Conclusion.*—On an indictment for perjury, the alleged perjury consisting of false testimony that at a certain time and place the defendant was offered $250 by the deceased if he would kill the slayer of the deceased, which was given in evidence on the trial of the slayer for murder, the time, place, and details so testified to, are not immaterial issues of which perjury could not be predicated. An indictment for perjury, concluding, "against the peace and dignity of the State of Illinois," is sufficiently formal. The ancient conclusion, "and so the jurors aforesaid, upon their oaths aforesaid, do say," etc., "that the defendant did commit wilful and corrupt perjury," etc., while appropriate, is not material. 1 Starr & C. St. c. 38, § 227, Par. 283. *Henderson v. People*, S. C. Ill., June 12, 1886, 7 N. East. R. 677.

14. CRIMINAL PRACTICE.—A judgment of conviction upon one count in an indictment for arson, which did not charge the act to have been done "feloniously," and which was not framed under the section of the Penal Code providing for the punishment of the act as a misdemeanor, will be arrested, if defendant has been acquitted upon another count charging the act to have been "feloniouly" done. *Commonwealth v. Weiderhold*, S. C. Penn., May 3, 1886, 3 Cent. R. 401.

15. WAYS.—*Eminent Domain—Private Benefit.*—When it is necessary, in order that a man may discharge the duties required of him by law, such as attending courts and elections, that he should have a passway over the land of his neighbor, the right of eminent domain may be invoked for the purpose; following Robinson v. Swope, 12 Bush, 21. *Cody v. Rider*, Kentucky Ct. of Appl. June 3, 1886. 1 S. E. Rep. 2.

16. EQUITY.—*Judgment — Execution Sale — Bills Quia Timet.*—One who is not a part or privy to a judgment is not affected by it, and, as to him, the judgment, and all proceedings under it, are void; and therefore neither the judgment, nor an execution sale of land affected by it, can change his rights in the land, or create a cloud upon his title, nor would a deed resulting from such a sale be valid, or work any mischief. Fears of such an injury would be, therefore, unreal; and a court of equity never interferes to enjoin a sale of land upon an idle or groundless suspicion, an unreal fear, or the mere possibility of its casting a cloud over the title of one in actual possession of the land under an unchallenged title. *Roman Catholic Archbishop etc. v. Shipman*, S. C. Cal., May 25, 1886, 11 Pac. Rep. 343.

17. EQUITY—*Specific Performance.*—Where the owner of lands, through or near which it is proposed to run a railroad, binds himself by writing under seal to convey to the projectors, their associates or successors, all the coal and iron upon and in certain designated lands, and to secure to them the right of way, in consideration that they would construct the road to a named point within a specified time; and the road is completed within the specified time, and a bill filed to compel the specific performance of the contract, the objection that it is wanting in mutuality, because of a stipulation that the projectors should not be liable for damages if they failed to construct the road, comes too late after the completion of the work. Since railroads may be built by private enterprise, without the aid of corporate powers, it is no objection to a specific performance that the projectors of the road had not been incorporated when the contract was made. The bond being made payable to the projectors by name, "their associates and successors," and duly assigned by them to a corporation, by which the road was built as stipulated, a bill for specific performance may be maintained by that corporation. The objection that a railroad corporation is not authorized by its charter to acquire any easements or interest in lands not necessary for the operation of its road, can only be raised by the State in a proceeding for the abuse of corporate franchise, and is not available in defense of a suit for the specific performance of a contract. Affirmed. *Wilks v. Georgia, etc. Co.*, S. C. Ala.

18. EVIDENCE—*Witness—Expert Witness—Right to a Preliminary Cross-Examination—Qualifications of an Expert—Municipal Corporations—Sewers—Notice.*—It is not error to refuse to permit the defendant to cross-examine an expert witness called by the plaintiff before the examination in chief by the latter. No standard exists by which to determine the qualifications of an expert witness. If it appears that he is *prima facie* qualified to testify, the court may allow his testimony to go to the jury, allowing the adverse party to cross-examine as to his qualifications, and leaving to the jury the duty of determining the weight of the testimony. In an action to recover for injuries resulting from negligence in constructing a sewer, it is not necessary for the plaintiff to prove that the ordinance directing its construction was regularly adopted. For the purpose of establishing notice of the defective condition of a sewer, it is proper to prove that the sewer gave way at a point not far distant from the break which caused the injury. *City of Fort Wayne v. Coombs*, S. C. Ind., June 16, 1886, 7 N. E. Rep. 743.

19. EXECUTORS AND ADMINISTRATORS—*Sales—Administrator's Deed.*—A deed which, merely from its recitals, purports to have been executed by an administrator upon a sale of lands previously directed and subsequently confirmed by the probate court, is inadmissible in evidence, and proves no conveyance of title, unless coupled with competent proof of the jurisdictional steps thus recited. *Tucker v. Murphy*, S. C. Tex., June 11, 1886, 1 S. W. Rep. 76.

20. FRAUD—*Fraudulent Representations of Value of Property of Stock Company—Misrepresentations as to Boundary of Real Estate—Questions of Fact for the Jury.*—A false and fraudulent representation, as to the property of a corporation, of material facts which necessarily affect the value of shares of stock therein, constitutes a cause of action against a party inducing another, by means of such fraudulent representations, to purchase such shares, quite as sufficient as if the purchase had been of the property of the company with regard to which the representation was made, nor is it material in either case, that the purchase price of the property, or the money advanced on the faith of the representation, be paid to the party making it for his individual benefit. If known to be false, and made with intent to deceive and defraud the person who is thereby induced to pay out his money, the person guilty of the fraud is liable to respond in damages, on the same principle on which one person is held liable in damages for fraudulently giving a false recommendation by which another is induced to give credit to a third party. The purchaser of an interest in real estate may rely upon the owner's representations as to its boundary line, there being nothing to indicate to the purchaser, at the time of inspecting the premises before purchase, that the line was different from that described by the owner; and the purchaser may maintain an action for damages sustained by reason of such false and fraudulent representations. Where there is a conflict in the evidence as to whether the representations were fraudulently or mistakenly made, it becomes a question for the jury. *Schwenck v. Naylor*, N. Y. Ct. App. June 1, 1886, 5 E. Rep. 868.

21. GUARANTY—*Condition That Co-Guaranty be Secured—Leaving of Instrument by Obligor With His Agent, With Condition for Delivery, not an Escrow—Evidence—Parol Evidence as to Written Contract—Parol Directions as to Delivery of Document Admissible—Executors and Administrators—Invalid Written Claim Presented—Recovery on Former Claim, of Which This was Renewal, not Allowed.*—Where the president of a corporation, as a guarantor of a draft by the corporation upon a bank, directed the treasurer of the corporation to inform the cashier of the bank that the draft was not to be taken unless A. placed his name on the back of it, which the treasurer communicated to the bank cashier, and A. did not place his name on the back of the draft, but gave a subsidiary separate writing of guaranty, whereupon the bank took the draft, there was no performance of the condition, and no guaranty by the president. The leaving of the draft in the hands of the drawer's own treasurer, as above stated, by the company, and its president as guarantor, do not constitute a delivery in escrow by such guarantor. Directions to an agent as to the delivery of a written contract may be shown by parol in an action on the contract. Where a written obligation

is presented as a claim against an estate, and such instrument proves to be invalid, but was given in renewal of a former obligation, a recovery upon the former obligation cannot be allowed in that proceeding. *Belleville, etc., Bank v. Bornman*, S. C. Ill., May 12, 1886, 7 N. E. Rep. 686.

22. INFANCY—*Guardian and Ward—Disability—Statutory Relief From.*—In relieving minors of the disabilities of infancy (Code, §§ 2735-41), the chancery court exercises a special and limited jurisdiction, and its decrees stand on the same footing as the judgments of courts of limited and inferior jurisdiction, whose recitals of notice or appearance may be impeached and contradicted, in a collateral proceeding, by extrinsic evidence. When the infant has a guardian, the petition asking to be relieved of the disabilities of non-age must be signed by the infant in person, and the guardian must join in the petition; and if the petition is signed by the guardian, in the name of the infant, but without his knowledge or consent, the decree founded on it is a fraud on the jurisdiction of the court, which the court will set aside on a direct proceeding, or, without setting it aside, will prevent the guardian from using it against the infant. A settlement of a guardian's accounts in the probate court, made during the minority of the ward, before the resignation of the guardian, and without the appointment of a guardian *ad litem*, is void for want of jurisdiction; and a decree in chancery removing the ward's disabilities as an infant, fraudulently procured by the guardian, imparts no validity to the settlement. A bill in equity filed by a ward within twelve months after attaining majority, seeking to compel a settlement of the accounts of his guardian, and to set aside conveyances executed by him to his guardian during his minority, based on a void settlement rendered by the probate court, is neither multifarious, nor wanting in equity. *Cox v. Johnson*, S. C. Ala.

23. LAND LAW—*Entry Writ of—Unrecorded Deed—Attachment—Judgment—Execution—Levy and Sale.*—In a writ of entry, A.'s title to certain premises was by deed of one B., executed and delivered in 1878, and recorded in 1880. C.'s title was under a levy and sale on execution in 1881 in a suit against B., in which the premises were attached in 1879. A. held an unrecorded deed when the premises were attached as the property of his grantor, B., but had recorded his deed before judgment and execution. *Held*, that A.'s right was collaterally affected by the judgment against B.; and, as he was not a party or privy to that judgment so that he could reverse it on error, he could avoid it by proof, and was entitled to judgment in the writ of entry. *Safford v. Weare*, S. Jud. Ct. Mass., July 2, 1886, 7 N. E. Rep. 730.

24. MECHANICS' LIEN—*Construction of Statute—Action by Mechanic—Set-Off—Claim Against Contractor.*—The statutes of this State upon the subject of mechanics' liens, being remedial in their nature, are to be liberally construed in order to carry out the purpose of the legislature in their enactment. Where a mechanic, who, under the employment of a contractor, and with the knowledge of the owner, has performed labor upon the construction of a building, and, the account not being paid, takes all necessary steps, as provided by §§ 3193, 3195, 3201 and 3202 of the Revised Statutes, to fix the liability of the owner, and to obtain a lien upon the premises, and brings his action against the owner to recover the amount due, and have the same declared a lien, such account being less than the balance unpaid on the contract, such owner cannot be allowed to set off a claim against the contractor, not growing out of the contract, acquired by him after the labor was performed, although such claim was acquired before notice that the mechanic's demand had not been paid. *Bullock v. Horn*, S. C. Ohio, June 29, 1886; 7 N. East. Rep. 737.

25. MORTGAGE—*Foreclosure—Sale—Palpable Error—Validity, how Affected—Surplus After Sale Tender—Burden of Proof.*—When the deed of mortgage contains a palpable clerical error in the figures of the sum due, the mortgagee may, after default, foreclose, and sell the property to satisfy the amount really due, without a previous reformation of the deed. The burden of proof is not upon the party claiming under a foreclosure of mortgage to show that the surplus over the amount due was, after sale, tendered the mortgagor. *Damon v. Deeves*, S. C. Mich. July 15, 1886; 29 N. W. Rep. 42.

26. NEGLIGENCE—*Landlord and Tenant—Liability for Nuisance—Fall of Awning, Liability for—Landlord and Tenant.*—A landlord is not liable for the consequences of a nuisance in connection with his building, which is in the possession and control of his tenants, unless the nuisance occasioning the injury existed at the time the premises were demised, or the building was defectively constructed, or was in such a condition, at the time of the demise of the building, that it constituted a nuisance, or would be likely to become such in the ordinary uses for the purposes for which it was constructed. A landlord is not liable for an injury caused to a bystander by the fall of an awning belonging to his building, which is in the possession of tenants, if the fall of the awning was attributable to an improper and negligent use of the awning by the tenant in permitting crowds of people to go upon it, when the only purpose of the awning was as a protection from sun and rain, and when, but for such crowd upon it, it would not have fallen. *Kalis v. Shattuck*, S. C. Cal., May 25, 1886; 11 Pac. Rep. 346.

27. ———. *Pleading—Injury to Servant—Master and Servant—Duty to Furnish Suitable Tools—Youth and Inexperience of Employe.*—In an action against a railroad company for an injury to the plaintiff's eyes by a fragment of steel, struck off by him in working on an engine, with a cold-chisel, if the declaration fails to aver any fact tending to show that he was not rightfully put at the particular work, or that the cutting of steel with a cold-chisel was not such work as an employe of the plaintiff's age and experience might be employed at, the declaration would be fatally defective on demurrer. It is the duty of the master to furnish his employe with suitable tools for the performance of the duties to which he may be assigned, and to give such instructions to a youthful and inexperienced employe as would enable him, with the exercise of ordinary care, to perform the duties of his employment with safety to himself. A declaration would be good on demurrer, which averred that the plaintiff, a youth of about 19 years of age, had never in fact been employed in the particular work in the doing of which the injury sued for was incurred, and was ignorant of the proper tools to perform the work with safety, was not instructed by the defendant as to the dan-

ger of the work, nor furnished with suitable tools to do the work. *Whitelaw v. Memphis, etc. R. R. Co.*, S. C. Tenn., June 5, 1886; 1 S. W. Rep. 37.

28. *Pleading—Injury to Property — Contributory Negligence—Municipal Corporations — Sewers—Notice of Defects—Wabash & Erie Canal—Use of Highways—Use of Private Property—Liability to Property Owners Who Make Connection With Sewer for their Private Benefit.*—A complaint to recover for injuries to property caused by negligence must show that the plaintiff was not guilty of contributory negligence. Where a municipal corporation itself constructs a sewer, it is bound to use ordinary care and skill, and is liable for injuries resulting from its negligence, without proof that it had notice of defects in the work or materials. The right of the public to construct sewers under the Wabash & Erie canal was not extinguished by the sale of the canal by the State. A municipal corporation may rightfully use highways for the purpose of constructing sewers. A city is liable for negligence in constructing and maintaining a sewer, although it is constructed in part on private property, and in order to obtain the right to make use of such property the municipal authorities were compelled to build the sewer according to the plans and specifications furnished by the owner of such property. A municipal corporation is liable for injuries arising from the negligent construction of a sewer to property owners who make connection with such sewer for their private benefit. *City of Fort Wayne v. Coombs*, S. C. Ind. June 16, 1886; 7 N. East. Rep. 743.

29. RAILROAD COMPANIES — *Fences—Negligence—Double Damage Act.*—If a railroad company has, within six months, duly fenced its road, it is necessary to show some neglect on the part of the company in maintaining the fence, or that it had notice of its being out of repair, or that it had remained so long out of repair that want of knowledge could be imputed to the negligence of the company, in order to recover for injury to cattle under the double damage act. *Townsley v. Mo. Pac. etc. Co.*, S. C. Mo. June 7, 1886: 1 S. W. Rep. 15.

30. RAILROAD—*Fire Caused by Defective Smoke-Stack—Question for Jury.*—Plaintiff's barn took fire soon after the passing of three of defendant's engines. There was some evidence that the fire-screens on two were in good order, but there was no proof given as to the condition of the third. *Held*, that it was by no means conclusive that the fire was caused by either of the two engines which it was claimed were in perfect order, and it was a question of fact for the jury to determine which engine caused the fire, and a non-suit was improperly granted. *Seeley v. New York, etc. R. R. Co.*, N. Y. Ct. App., June 1, 1886; 7 N. East. Rep. 734.

31. RAILWAY COMPANIES—*Liability as Warehouseman—Time Within Which Goods Must be Removed.*—The consignee is allowed a reasonable time to remove the goods after they arrive at the place of destination, and if not present on their arrival, the company may deposit them in its depot or warehouse for safe keeping without additional charge until such reasonable time expires. Until the consignee has had a reasonable opportunity to remove the goods, the liability of the railroad company as a carrier continues; but on his failure to do so, the company is only responsible thereafter as a warehouseman or keeper for hire. Ala & Tenn. Rivers R. R. Co. v. Kidd, 35 Ala. 209; S. & N. Ala. R. R. Co. v. Wood, 66 Ala. 67; Kennedy v. Mo. & Gir. R. R. Co., 74 Ala. 430; McGuire v. L. & N. R. R. Co. (Dec. Term, 1885,) 1 So. Law Times, 492. What length of time will be reasonable, must of necessity depend in a great measure upon the attendant facts and circumstances, which must be submitted to the jury under proper instructions from the court. It may be generally said, that in determining what constitutes a reasonable opportunity, the convenience or necessities of the consignee will not ordinarily be taken into consideration. The question is, has suitable time been allowed to a person, living in the vicinity of the place of delivery, to remove the goods in the ordinary course and in the usual hours of business; more prompt diligence being required, if the consignee has been informed of the shipment of the goods by receipt of a duplicate bill of lading or otherwise. Hutch. on Car. § 377. *Louisville & Nashville R. R. Co. v. Oden*, S. C. Ala., Dec. Term, 1885-86.

32. SALE—*Implied Warranty—Goods for Particular Purpose—Warranty—Recoupment of Damages.*—When specific chattles are purchased for a particular purpose understood by vendee and vendor, and the vendee has no opportunity to inspect them, there is an implied warranty, usually, that they shall be reasonably fit for that purpose. Where there is a warranty, express or implied, in the sale of goods, the vendee need not return, or offer to return, the goods in order to establish his right to recoup the damages he sustains by a breach of such warranty. *Best v. Flint*, S. C. Vt., July 19, 1886, 5 Atl. 192.

33. TRUST — *Resulting Trust — Purchase — With Money of Third Party — Promise to Devise—Laches.*—Where funds of A. were used by M. in the purchase of real estate, with the implied consent of A., M. promising that at her death the property should be A.'s, and M. died, leaving a will in which the property was left to B., to whom she was indebted, on condition that he should pay to A. a certain sum, and A. was notified of the provisions of the will, but took no steps in the premises for 23 years, A. is to be presumed to have acquiesced in the provisions of the will, and cannot maintain a bill in equity to compel B. to convey to him the estate purchased by him. *McGivney v. McGivney*, S. Jud. Ct. Mass., June 30, 1886, 7. N. E. Rep. 721.

34. WILL—*Bequest in Trust to Testator's Children and Descendants—Public Charity—Rule Against Perpetuities.*—A bequest to trustees, their heirs and assigns, forever, in trust, "to appropriate such part of the principal and interest as they may deem best for the aid and support of those of my (the testator's) children, and their descendants, who may be destitute, and, in the opinion of the trustees, need such aid," will not admit of being construed as a gift to the testator's children and their descendants who might be living at the time of the testator's decease, or that of the last of his children. Such a bequest is not a public charity, and, being too remote, as tending to create a perpetuity, is to be deemed invalid and without effect. *Kent v. Dunham*, S. Jud. Ct. Mass., July 6, 1886, 7 N. E. Rep. 730.

35.———. *Contesting Probate—Verdict—Certainty of—New Trial—Separation of Jury Before Verdict—Competency of Testator—Undue Influence—*

Importunity — Instruction to Jury — Error. — Where the validity of a will was involved, and the verdict of the jury was written upon the back of one of the judge's instructions as follows: "We, the jury, find this not to be the will of the testator, Samuel Bledsoe. D. B. DAILEY, Foreman;" *held*, that the verdict was sufficiently certain and responsive to the issue. The fact that two of the jurymen separated from the others for a few moments after the cause had been submitted to them for a verdict, and before its rendition, will not vitiate the verdict, where it does not appear that there was any corrupt purpose upon the part of any one, or that during such separation the two jurymen were approached as to the case, or that anything occurred during such absence which influenced or produced the verdict. Undue influence, obtained by importunity, and which gave dominion over the will of the testator to such an extent as to destroy his free agency, will vitiate a writing, purporting to be a will, which was the product of such importunity or influence. If a testator has capacity to make a will, and is not unduly influenced, he may make as unequal a disposition of his property among his children as he pleases; and it is error to single such unequal distribution out from other evidence and to instruct especially as to that, thus giving it undue prominence and tending to lead the minds of the jury from the real issue of capacity or undue influence. *Bledsoe v. Bledsoe*, Kentucky Ct. App., June 17, 1886, 1 S. W. Rep. 10.

36. ———. *Estate Less Than one of Inheritance—Act of April 8, 1833.*—Where a devise is that A. shall retain property devised by the will to B., and pay to the latter the interest thereof annually during his natural life, and that after B.'s death "his share" shall be "equally divided among his children, if he should have any," there is a sufficient indication of the testator's intention to give B. less than the fee, to satisfy the requirements of the act of April 8, 1833, which provides that by a devise without words of inheritance or of perpetuity the whole estate of the testator shall pass unless the contrary appear by a devise over or by words of limitation, or otherwise in the will. Under such a devise the only interest given to B. is a right to the income for life. *McDevitt's Appeal*, S. C. Penn., May 31, 1886, 22 Rep. 125.

37. ———. *General Power of Disposal to Devisee Accompanying a Life Estate—Circumstances Showing Intent to Give Power of Absolute Disposition—Extrinsic Evidence—Evidence of Condition of Property Admissible to Determine Extent of Power.*—Where a power of disposal accompanies a bequest or devise of a life-estate, the power of disposal is only co-extensive with the estate which the devisee takes under the will, and means such disposal as a tenant for life could make, unless there are other words clearly indicating that a larger power was intended. Where the life-tenant is given a power of disposition for a certain purpose, which it would be impossible to accomplish by a sale of the life-estate, and which can be accomplished only by a disposal of the fee, the power must be held to be that which is necessary for the accomplishment of the purpose. And where the life-estate is, in the main, in unimproved and unproductive realty, and the purpose is the support of the family, the power will be held to allow an absolute disposition. In interpreting such a power the court will look at the circumstances under which the devisor makes the will, as the state of his property, of his family, and the like; and the admission of such evidence is not a violation of the rule forbidding the variation of the will by parol evidence. *Kauffman v. Breckenridge*, S. C. Ill., June 12, 1886, 7 N. E. Rep. 674.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

17. A county purchases a track of land (under the provisions of an act of congress) upon which to locate a Co. seat. The town is platted into blocks, lots, streets and alleys. The plat, is acknowledged by the county commissioner, and recorded. Would non-user of a street or alley for 25 years amount to an abandonment? If not, what length of time would amount to an abandonment. W. H.

QUERIES ANSWERED.

Query 10. [21 Cent. L. J. 258]. Can a State constitutionally enact that a creditor shall not under the penalty of a fine, transfer the claim against a citizen debtor to be collected by attachment garnishment or other process out of the debtor's wages in the courts of other States when the creditor, debtor and person owing the money are all within the jurisdiction of the courts of the State, enacting the law. * * * C.

Answer.—Ohio has the following statute, passed May 11, 1878, and amended, March, 1882. Sec. 7014. Whoever assigns or transfers any claim for debt against a resident of this State, for the purpose of having the same collected by proceedings in attachment in courts outside of this State, or whoever, with intent to deprive a resident of this State of a right to have his personal earnings exempt from application to the payment of his debts, sends out of this State any claim for debt against such person for the purpose aforesaid, where the creditor and debtor and the person or corporation owing the money intended to be reached by such proceedings are within the jurisdiction of the courts of this State; shall be fined not more than fifty nor less than twenty dollars; and the person whose personal earnings are so attached shall have a right of action before any court of this State having jurisdiction, to recover the amount attached, and any costs paid by him in such attachment proceedings, either from the person so assigning, transferring, or sending such claim out of this State to be collected as aforesaid, or the person to whom such claim is assigned, transferred, or sent as aforesaid, or both, at the option of the person bringing such suit. The assignment, transfer, or sending of such claim to a person not a resident of this State, and the commencement of such proceedings in attachment, shall be considered *prima facie* evidence of a violation of this section. J. E. P.
Warren, Ohio.

The question is not answered because it is not shown whether the statute is constitutional or not There seems to be no ruling on that point. Ed. Cent L. J.

Query 34. [22 Cent. L. J. 287].—A. offers for sale to B. a horse for $100, on six months credit. B. accepts the offer, whereupon A. says: "Then you must give me your note for the amount due in six months." This B. declines to do—whereupon A. says "Well,

take the horse and you need not give the note,"—whereupon B. says: "Well, I decline to take the horse." Is there any contract by which the parties can be held liable to each other. JAS. B. STUBBS.
Galveston, Tex.

Answer.—To make a contract, the minds of the two parties must agree. When B. accepted A's offer, there was a contract, but A. withdrew his offer by insisting upon additional conditions. B. evidently did not try to hold A. on his original proposition, so the offer and acceptance were mutually withdrawn. After that, the minds of the two parties did not come together, for when A. renewed his offer, B. declined it. But the whole contract would be invalidated by the statute of frauds, which in this case would require both on acceptance and delivery of the property to make the contract binding. In this case there was no delivery.
S. S. M.

RECENT PUBLICATIONS.

FEDERAL DECISIONS.—Cases argued and determined by the Supreme, Circuit and District Courts of the United States. Comprising the opinions of those courts from the time of their organization, to the present date, together with extracts from the Opinions of the Court of Claims, and the Attorneys-General, and the Opinions of general impatienc of the Territorial courts. Arranged by William G. Myer, Author of an Index to the United States Supreme Court Reports; also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri, and Tennessee, a Digest of the Texas Reports, and local works on Pleading and Practice. Vol. XIV. Dedication—Equitable Suits. St. Louis, Mo: The Gilbert Book Company, 1886.

The learned editors and enterprising publishers of this valuble collection are pushing along their work bravely and energetically. Within the last four months we have had occasion to notice the issuance of four volumes of the series and the fifth now before us is in no respect inferior to its predecessors. Considering the subjects included in it, it is perhaps more important than any of them. Four hundred and thirty two pages are devoted to Domestic Relations, than which no more important and all-pervading topic is to be found in the Law. The other subjects to which this volume is devoted, are, Dedication, Domicile, Duress, Easements, Elections and Eminent Domain, all, little less important than which occupies more than half the book. This volume is fully up to the standard of the general work in editorial ability and acumen, as well as mechanical execution, and we could give it no higher praise.

We learn that Vol. XV will soon be issued, and the remaining volumes of the series will follow in rapid succession. When the thirty volumes which it is understood will constitute the whole work, shall have been placed before the public, they will, in our judgment, form the most valuble and important compilation of living law within the same compass, now extant in the English language.—

JETSAM AND FLOTSAM.

GOOD ADVICE.—The late Thomas Corwin of Ohio, once gave this wholesome advice to a law-student:

"After all, you must have one thing at command, without which all books are useless—a mind that hungers and thirsts after truth. This last and greatest requisite you can command if you will. If you have it, you have one of the rarest attributes in the character of our young men.

"Young men seem to me not to know that they have work to do. It is one of the most discouraging signs of our times, that young men live in the habitual idea that they are to be fed with a pap-spoon. They will learn, when it may be too late, that God has sent just one message to every man and woman which He has created or will create. It is short, simple, and can not be misunderstood:

"'Know thy work, and do it.'"

RETORT COURTEOUS.—Exciting as are the political contests of these days, they are mild in comparison with those which seventy-five years ago arrayed Federalists and Democrats against each other.

The War of 1812 was strongly favored by the Democrats, and as strongly opposed by the Federalists. One of the incidents of the war was the famous Hartford Convention, which the Democrats denounced as "infamous."

Roger Minot Sherman and Calvin Goddard, who had been members of the Convention, were one day talking with Judge Peters, a strong Democrat, and one of the United States District judges. The conversation having drifted on the subject of the Convention, Judge Peters said, half facetiously and half in earnest:

"Well, gentlemen, if you had been tried before me for that matter, I would have hanged you both, not only without law and evidence, but, if need be, against both."

"That only proves your honor's remarkable impartiality," answered Sherman, making a low bow—"that you would decide our case on the same principle that you do the greater part of the cases which come before you."

ACCENT.—Homer nods, and even the most skilful of jury lawyers may err through excess of zeal. Sir James Scarlett was noted for his tact in cross-examining a witness; but occasionally he would get a fall, from not looking ahead and seeing where he was going.

Once a boy whom he was examining said, "I suppose."

"Suppose!" interrupted Scarlett, "you have no business to suppose anything."

The examination went on, and to a question of Scarlett's the boy answered, "I don't know."

"Don't know!" rejoined the irritated lawyer, "perhaps you can't even suppose?"

"I suppose I have no business to suppose anything," replied the boy, amid the laughter of court and bar.

But the great advocate's severest "tumble" was while examining a witness named Tom Cooke. One music publisher had sued another for violating his copyright of an arrangement of the song, "The Fine Old English Gentleman." Said Scarlett, in cross-examining Cooke.

"Now, sir, you say that the two melodies are the same, but different. What do you mean by that?"

"I said that the notes in the two copies were alike," answered Cooke, "but with a different accent, the one being in common time, the other in six-eight time; and consequently, the position of the accented notes was different."

"Now, sir, don't beat about the bush, but explain to the jury the meaning of what you call accent," said Scarlett, in his roughest style.

The lawyer's manner put the witness on his mettle, and he answered.—

"Accent in music is a certain stress laid upon a particular note, in the same manner as you would lay a stress upon any given word for the purpose of being better understood.

"Thus, If I were to say, 'You are an *ass*,' it rests on ass; but if I were to say, '*You* are an ass, it rests on you, Sir James."

The shouts of laughter which followed this explanation caused Sir James to become *scarlet* in more than name, and in a great huff he said,—

"The witness may go down."